

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

Appellee,

:

-VS-

:

Case No. 03-137

NATHANIEL E. JACKSON,

:

Appellant.

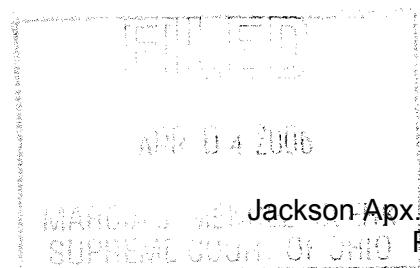
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Death Penalty Case

ON COMPUTER-ALM

VOLUME II

APPELLANT'S APPENDIX OF TRANSCRIPT PAGES
IN SUPPORT OF HIS APPLICATION FOR REOPENING



NATHANIEL JACKSON
MITIGATION TRANSCRIPT

1 Thursday, November 14, 2002, Mitigation Hearing,
2 In Open Court at 1:00 p.m.:

3 THE COURT: We have several matters
4 for the record before we call the Jury up. It is
5 come to my attention that Mr. Lewis, co-counsel on
6 the defense team, has had a little stay in the
7 hospital, nothing serious. He's back home now, but
8 because he's medicated, does not feel it would be
9 appropriate to appear on the defense team today.
10 Mr. Consoldane, I have asked you, with the
11 Prosecutor, whether or not you had any motion or
12 wish to have this matter continued until Mr. Lewis
13 is available, and what is your reply to that?

14 MR. CONSOLDANE: I have talked with
15 Mr. Jackson and we do not think that any delay at
16 this point would be wise. I have also talked with
17 Tom Wright, who has a contract to work with our
18 office. Mr. Wright has gone through the three day
19 death penalty seminar. He also meets the other
20 requirements. He, however, is not certified. He
21 has not applied for the certification and would ask
22 the Court to permit him to sit as co-counsel in

1 this case with me, so we can get this finished.

2 THE COURT: May I speak to your
3 client?

4 MR. CONSOLDANE: Yes.

5 THE COURT: Mr. Jackson, are you in
6 agreement with proceeding without Mr. Lewis being
7 here and having Mr. Wright and Mr. Consoldane?

8 THE DEFENDANT: Yes, Sir, Your
9 Honor.

10 THE COURT: I understand that I
11 would consider a continuance until probably Monday,
12 if you wished.

13 THE DEFENDANT: Yes, Sir.

14 THE COURT: You have talked with
15 your attorney and have agreed with him that it is
16 in your best interest to go forward today?

17 THE DEFENDANT: Yes, Sir, Your
18 Honor.

19 THE COURT: Fine. In regard to Mr.
20 Wright, the Court is aware that he practices in our
21 county and practices before this Court on a regular
22 basis. And I have no problem with allowing him for

1 the purposes of this particular part of the
2 proceeding to proceed. I think that even if Mr.
3 Lewis is not available and Mr. Consoldane and his
4 client wishes to proceed with just the one lawyer,
5 that I would find no problem with that, but two
6 heads are better than one. The request of
7 Mr. Consoldane to have Mr. Wright seated at counsel
8 table to assist in any way possible, is approved.
9 The State have any objection to that?

10 MR. WATKINS: No. The State would
11 make it clear that we would not object to a
12 continuance if the Defendant and his counsel, and I
13 recognize that Attorney Consoldane is first chair
14 in this case, and I respect their desire, but I
15 want the record to reflect that the State also
16 would concur with the continuance if the Defendant
17 desired to have that in order that Mr. Lewis
18 participate in the second chair.

19 MR. CONSOLDANE: Dennis, do you
20 object to Mr. Wright sitting as co-counsel, even
21 though he doesn't have the actual certification at
22 this point?

1 MR. WATKINS: I have no objection
2 with Mr. Wright. I think he could fill in and as I
3 understand it, the Defendant is waiving any right
4 that he would have under the statute to have
5 someone certified, is that right, Tony?

6 MR. CONSOLDANE: That is right.

7 THE COURT: Very good. Now was
8 there another issue?

9 MR. CONSOLDANE: Yes. Dr. McPherson
10 is our expert, which we were allowed to hire
11 through permission of the Court and she has written
12 a summary and a background about Mr. Jackson, but I
13 think it is also important that she be able to talk
14 to the Jury about his family members and she's
15 going to, but I think it would be better able to
16 help me in Court, when I am interviewing the family
17 members, if she's here with me. She knows far more
18 about the background of the family than I do, and
19 it was -- I got a little shorthanded with Mr. Lewis
20 going into the hospital and I just got ahold of Mr.
21 Wright this morning, and there's nothing that she's
22 going to testify to any differently. She's already

1 filed her report and given a copy to the
2 Prosecutor, and I'll have a copy for the Court.
3 And I just believe that her aid in this matter
4 would help me a lot.

5 THE COURT: The State?

6 MR. WATKINS: We object to the
7 presence of an expert witness in the Courtroom.
8 Obviously, these witnesses that testify, I may have
9 questions of the expert and if the expert were
10 here, it would defeat the purpose of separation of
11 witnesses. At no time in my memory, has any expert
12 witness been at trial table in this kind of
13 scenario, and therefore, we strongly object. I
14 would further note that if Attorney Consoldane
15 feels he's not prepared because of the short
16 notice, that this case should be continued until
17 he's prepared and able to go forward without the
18 witness being in the courtroom, because to me that
19 is not good reason to have a witness in the
20 courtroom, when there's a separation of witness
21 order.

22 MR. CONSOLDANE: We had the

1 Jury present at 1:20 p.m.)

2 THE COURT: Good afternoon. We're
3 now ready to proceed with the second phase of this
4 trial, which is necessary because of the finding on
5 phase one. You will be requested at the conclusion
6 of this presentation to make a recommendation on
7 sentencing to this Court. I would like to tell you
8 that that word recommendation is argued back and
9 forth between counsel as to the meaning of it.
10 Under our law, a Judge has no power to ever
11 increase a penalty, only to decrease a penalty, but
12 only if after an independent finding by the Court,
13 the Judge, there's a finding that there was not
14 sufficient evidence for the Jury, to make the
15 finding that they did. So, your recommendation is
16 a recommendation to the Court, and it is more than
17 that. It is your decision, and it would not be
18 tampered with by the Judge unless you have gone
19 awry somewhere. I would like to know at this time,
20 if any of you have now formed such a fixed opinion
21 on what sentence you should -- that should be
22 entered in this second phase, or has so closed your

1 introduce the evidence that was on the record and
2 admitted under phase one. You wish to proceed?

3 MR. CONSOLDANE: I'll enter an
4 objection at this time until they can prove that
5 what individual pieces of evidence are necessary
6 for the second portion.

7 THE COURT: We have reserved that
8 right to you on the record. You may proceed.

9 RAYMOND DICKERSON
10 having been duly sworn according to law, on his oath,
11 testified as follows:

12 DIRECT EXAMINATION BY MR. CONSOLDANE:

13 MR. CONSOLDANE: Before I start, all
14 of the witnesses have requested that they not be
15 photographed.

16 THE COURT: They have been notified.

17 Q. Raymond, would you state your name for the
18 Jury?

19 A. Raymond Dickerson.

20 Q. Where do you live?

21 A. I live in Youngstown. I live at 13 South
22 Pearl Street.

1 Q. Do you know Nathaniel sitting over there?

2 A. He's my stepson.

3 Q. You have known him since he's been about 15?

4 A. Since 15 years old, I have known Nathaniel.

5 Q. And the entire time that you have known him,
6 has he always been respectful to you?

7 A. Yes, Sir.

8 Q. Has he been respectful to his mother?

9 A. Yes, he has.

10 Q. And was his grandmother, how about his
11 grandmother?

12 A. Very respectful with his grandmother.

13 Q. You didn't know him much before 13, but after
14 the age of 15, did he continue to live
15 with his mother?

16 A. Yes, he has.

17 Q. And did there come a time when he moved out?

18 A. He got older, when he moved out.

19 Q. How old was he, 17 when he moved out?

20 A. About 17, somewhere like that.

21 Q. And do you know where he moved, when he moved
22 out?

1 A. No, I did not.

2 Q. After age 17, you didn't see a whole lot of
3 Nathaniel?

4 A. No, I haven't, no, I didn't.

5 MR. CONSOLDANE: Thank you. Nothing
6 further.

7 MR. WATKINS: No questions. We
8 thank the witness.

9 THE COURT: You may step down.

10 TAUSHIA KORNEAGAY

11 being duly sworn according to law on her oath,
12 testified as follows:

13 DIRECT EXAMINATION BY MR. CONSOLDANE:

14 Q. How are you today?

15 A. Fine.

16 Q. Would you introduce yourself to the Jury,
17 please?

18 A. Taushia Korneagay.

19 Q. And where do you live, Taushia?

20 A. 203 East Florida Street.

21 Q. And how are you related to Nathaniel Jackson?

22 A. I am his sister.

1 Q. You have known him pretty much all of your
2 life?

3 A. Yes, I have.

4 Q. Are you older or younger?

5 A. I am the next to the youngest. There's four
6 of us.

7 Q. And how has Nathaniel treated you?

8 A. He treated me really good. He loved me just
9 like I love him. He's really kind. He
10 did a lot for me. I got four kids.

11 Q. He come over and help out with the kids?

12 A. Yes, he helped out a lot with the kids. Kept
13 them, washed them, everything. He kept
14 them, he loved them. He did a lot for
15 us.

16 Q. And did there come a time when you were still
17 living at home and Nathaniel moved out?

18 A. Yes.

19 Q. And do you know where he went out and moved
20 to?

21 A. I was young at the time, because I am only 25.
22 He stayed with my grandmother.

1 Q. Pretty much living on the street?

2 A. He ain't living on the street, because my
3 grandma took him in.

4 Q. You like to see -- would you like to see the
5 Jury save his life?

6 A. Yes, I would.

7 Q. Would you like to be able to write to your
8 brother in prison?

9 A. Yes.

10 MR. CONSOLDANE: Thank you. Nothing
11 further.

12 CROSS EXAMINATION BY MR. WATKINS:

13 Q. Taushia, you remember me, we have talked a
14 couple of times?

15 A. Yes.

16 Q. You are 25 and your brother is 30 years old?

17 A. Yes.

18 Q. And have you visited him in jail?

19 A. Yes, I have.

20 Q. And when you were raised in Youngstown, you
21 had your mother and your grandmother next
22 door?

1 A. Yes.

2 Q. And would you describe Nathaniel as a very
3 smart person?

4 A. I describe him as very smart.

5 Q. Did he have talent as an artist? Could he
6 draw?

7 A. Yes. He always kept busy, yes.

8 Q. When you were a child growing up, did you ever
9 see your brother abused?

10 A. No.

11 Q. He was treated well by your mother and your
12 grandmother?

13 A. Yes, he was.

14 Q. And by his stepfather?

15 A. Yes.

16 Q. And you really didn't know his father, did
17 you?

18 A. No, not too good.

19 Q. And you work pretty hard yourself to bring up
20 your four children?

21 A. Yes, I have.

22 Q. And you haven't been in any real problem, have

1 you?

2 A. No.

3 Q. And when you were a child and when he was a
4 child, were you taught right from wrong?

5 A. Yes, we have been.

6 Q. Did Nathaniel Jackson go to church?

7 A. Yes, my Mom kept us at church.

8 Q. He knew right from wrong?

9 A. He knows right from wrong.

10 Q. And your mother bring you up to be responsible
11 for what you do to others?

12 A. Yes.

13 MR. WATKINS: Thank you.

14 THE COURT: Any redirect?

15 REDIRECT EXAMINATION BY MR. CONSOLDANE:

16 Q. You still keep in contact with Nathaniel?

17 A. I still have contact with him.

18 MR. CONSOLDANE: Thank you. Nothing
19 further.

20 THE COURT: You may step down.

21 Thank you very much.

22

LORRAINE RUE

having been duly sworn according to law, on her oath,
testified as follows:

MR. WATKINS: I have no objection
for her to remain, the mother to remain there.

(Also seated on the witness chair is Shaylese
Townsend Jackson. Both Lorraine and Shaylese are
on the witness chair.)

DIRECT EXAMINATION BY MR. CONSOLDANE:

Q. Lorraine, Shaylese is your daughter?

A. Yes.

Q. It is also Nathaniel's daughter?

A. Yes.

Q. Has Nathaniel seen his daughter before?

A. Yes.

Q. And has he brought her things?

A. Yes.

Q. And what grade is Shaylese in school now?

A. Second grade.

Q. Shaylese, what is your favorite subject in
school?

A. (Shaylese) Playing games.

1 Q. Pauline, I'm going to direct your attention
2 back to when Nathaniel was growing up.
3 When he went to school, how did he do in
4 school?

5 A. He did pretty good in school.

6 Q. Did he have any problems in school?

7 A. No, not really.

8 Q. There come a time when Nathaniel quit school?

9 A. Yes, he did.

10 Q. Where did he go to live at after that?

11 A. He was staying with me and my mother. I was
12 staying with my mother at the time.

13 Q. Was this a pretty rough neighborhood?

14 A. No. We don't stay in a rough neighborhood.

15 Q. One time you wrote a letter to the school
16 telling them to excuse Nathaniel, because
17 he had been shot?

18 A. No.

19 Q. You don't remember that?

20 A. No.

21 Q. You don't remember Nathaniel being shot?

22 A. No, I don't. Our neighborhood was not rough.

1 Q. Do you keep in touch with Nathaniel?

2 A. Yes, I do.

3 Q. You come visit him?

4 A. Yes.

5 Q. And if he was going to be sent to prison,
6 would you continue to visit him?

7 A. Yes, I would. I would love to.

8 Q. You would rather visit him in prison than
9 visit his grave?

10 A. I would visit him in prison, yes.

11 MR. CONSOLDANE: Thank you.

12 MR. WATKINS: No questions.

13 THE COURT: You may step down.

14 DR. SANDRA MCPHERSON

15 having been duly sworn according to law, on her oath,
16 testified as follows:

17 DIRECT EXAMINATION BY MR. CONSOLDANE:

18 (Defendant's Exhibit P Marked for Identification.)

19 Q. Doctor, how are you this afternoon?

20 A. Just fine.

21 Q. Would you introduce yourself to the Jury,
22 please?

1 those who work with them. He has had
2 very little in the way of work history.
3 He's 30 years old, but I think his
4 longest period of work was about six
5 months, maybe less. Perhaps less. And
6 it was a piece work or periodic work
7 situation. He was never full time. He
8 dropped out of school at the 11th grade,
9 and his involvement or his record at that
10 point included juvenile offenses. He
11 wound up once he was an adult, going off
12 and living on his own. He talked about
13 deciding he wanted to be on his own. His
14 mother kind of hoping he wouldn't leave,
15 but supporting him in being independent
16 as he saw it. Unfortunately, his idea of
17 independence was to basically survive on
18 the streets and the streets he was
19 surviving on were fairly violent ones.
20 During the ensuing ten years or so, he
21 was shot at least four or five times.
22 When he was -- well, before he left the

1 accessible.

2 My read on his situation is that the
3 family has been able to function only in
4 a relatively marginal fashion and
5 certainly has not been able to intervene
6 in the patterns of behavior that have
7 been present practically since he was
8 visible in the community.

9 Q. One thing as part of this process, you and the
10 psychologist you work with, have
11 administered several tests to Nathaniel,
12 is that not correct?

13 A. That is correct.

14 Q. First of all, would you explain to the Jury
15 what the level of mental retardation
16 would be?

17 A. We generally consider a person to have mild
18 mental retardation if they are testing at
19 or below 60 on an I Q test and also if
20 there are other indications, that their
21 life adjustment is impaired and in need
22 of certain kinds of support or help. A

1 person who is functioning above that
2 level is in a borderline range and as we
3 move on upward into a low average range,
4 an average range and above.

5 Q. What I noticed is that you tested Nathaniel
6 and he had a full scale IQ of 84. Is
7 that correct?

8 A. That is correct.

9 Q. And but looking at where you cited in the
10 school records, is that he had an IQ of
11 about 70 when he was tested twice in
12 school?

13 A. Correct.

14 Q. That is kind of amazing that somebody could
15 raise their IQ so many points?

16 A. Yes, it is. It is a very unusual pattern.
17 There were two testings during school and
18 I realize the report I put down fourth
19 grade and tenth. It was actually seventh
20 and tenth grade. In both of those
21 testings he was at or around the 70
22 level. His improvement and IQ quite

1 frankly, I attribute it to a couple of
2 things. First of all, his level of
3 cooperation and attention and focus was
4 very poor during his school years,
5 throughout. At no time was he ever
6 tested, for example, after being
7 medicated for his condition, because he's
8 never been medicated for his condition
9 except what he might be doing to himself.
10 When we tested him, he was in an entirely
11 structured situation in the jail and he
12 had spent some time in a structured
13 situation prior to that time when he was
14 incarcerated. His degree of attentional
15 deficit was somewhat less and certainly
16 his degree of cooperation was higher in
17 that he wanted to try and produce what he
18 could for us, since we were working on a
19 defense for him. So, he did better. The
20 pattern of the scores is consistent with
21 the educational deficit and also with
22 some underlying learning disabilities.

1 But his full scale IQ is 84. In fact,
2 based partly on the sub test and partly
3 on what we know about the test bias, he's
4 an African American who has not had a
5 good education, the test is biased
6 against him. The chances are he's of
7 average ability, and under the right
8 circumstances could have been quite
9 reasonably successful in life.

10 Q. And he even has a little bit of artistic
11 ability, too?

12 A. This is noted in the records and mentioned by
13 others, yes.

14 Q. Now, you mentioned that he kind of self
15 medicated himself. The proper medication
16 for him at the time, probably would have
17 been Ritalin?

18 A. Ritalin or there's psycho-stimulants is what
19 they are, but what they appear to do is
20 to intervene in the operation of the
21 systems, so that it works better. They
22 don't appear, for at least for those for

1 whom they work, and we need to know more
2 about that, but for that subsection of
3 people for whom they work, they appear to
4 allow the inhibitors to work better.

5 Clearly he was never tried, even tried on
6 any kind of medication program. There's
7 a letter in the school records from a
8 teacher, who identifies him in her eyes
9 as being emotionally ill and talks about
10 his behavior, talking to himself and
11 talking to something which is not there.
12 There are no signs that he's psychotic,
13 but I am quite sure she was seeing a lot
14 of discontrolled verbal behavior, that is
15 part of his situation.

16 Q. Matter of fact, in your summary, one of your
17 diagnoses was a major impairment. What
18 does that mean?

19 A. I am looking at the --

20 Q. That would be Axis V.

21 A. That is the -- it is an adjustment scale and
22 40, there are behavior descriptions for

1 assigning different level numbers. His
2 behavior and functioning allows me to
3 assign him a score of 40, which is
4 indicative of major impairment in several
5 areas of function. You can also get a 40
6 if you have an impairment in one specific
7 area of function, if it is psychotic,
8 lack of ability to appreciate reality.
9 That is not the case here, but what we
10 have is a number of areas where he has
11 not got the skills to succeed, most of
12 them relating to society, but also his
13 ability to deal in relationship context,
14 his ability to work in a consistent
15 fashion, to use whatever abilities he has
16 have never been in evidence.

17 Q. And then on Axis II, you indicated he has an
18 anti-social personality disorder.

19 A. That is correct.

20 Q. You added a caveat to that though?

21 A. The anti-social personality disorder is a
22 diagnosis that describes a long term

1 impairment in an individual's ability to
2 conform their behavior to social
3 expectations, to stay out of trouble, to
4 not get into legal difficulties, to
5 control their reactions and not behave
6 impulsively indestructive ways. All of
7 which describe aspects of this
8 Defendant's behavior. However, the
9 category also overlaps with a group of
10 people who are particularly serious, we
11 call them psychopaths or sociopaths and
12 they have no ability or very little
13 ability to identify with the needs of
14 others, to exhibit loyalty, to have any
15 real kind of connectness to others and
16 they often commit extraordinarily heinous
17 crimes when they are seen in the context
18 such as this. This gentleman certainly
19 meets the requirements for an anti-social
20 personality disorder. He does not meet
21 the requirements for that other category
22 and he has shown the capacity to be loyal

1 within his own group. In his discussion
2 of his own life, one of the
3 disappointments he detailed was finding
4 out that a friend betrayed him. He
5 expected, since he had a friendship, that
6 that wouldn't happen, so he has the sense
7 of what a friend is supposed to do, and
8 he was surprised when that doesn't take
9 place. He himself was loyal to the
10 codefendant, rather than simply trying to
11 get out of it and blame everything on
12 her. People who would do the latter are
13 more in that category of sociopathic
14 behavior. So he's clearly a person whose
15 behavior has been formed in an
16 anti-social world and who has exhibited
17 anti-social qualities. He merits the
18 diagnosis as do a significant proportion
19 of those who are incarcerated, but he
20 does not mirror the diagnosis of an
21 individual who is incapable of relating
22 to people.

1 follow. The fact that he tends not to
2 get into trouble also fits with the fact
3 that he does have the capacity to get
4 along with other people and to have some
5 people oriented skills. So, he also
6 retains, of course, a loyalty and a love
7 for his family. So, there's human
8 feeling that is part of the way in which
9 he operates.

10 Q. And how about the relationship with Donna
11 Roberts?

12 A. It was clearly a very destructive relationship
13 for the victim most assuredly, but also
14 for the people involved. Up until the
15 time that relationship took place,
16 Mr. Jackson, although he had an
17 anti-social life style, criminal life
18 style in many respects, he had not been
19 involved in this kind of activity that
20 leads to murder or serious harm to other
21 human beings. He's basically an
22 individual -- well, he's an individual

1 who has had some bad experiences in a
2 relatial context. He's very
3 insecure, though he tries to pretend that
4 he's very adequate. Again, something
5 that we find in ADHD kids who have been
6 in an environment that basically tells
7 them they are bad kids, so they have to
8 do something about how they feel about
9 themselves. In this relationship, I
10 think he received a certain amount of
11 reassurance. He was told that he was a
12 great guy. It made him feel good. It
13 made him feel like he was somebody
14 special. The relationship was built on
15 that. The relationship has a couple of
16 interesting characteristics. It was a
17 bi-racial relationship. And it was also
18 a relationship between Mr. Jackson and a
19 much older woman. Mr. Jackson's prior
20 relationships though at least in one
21 instance, perhaps more than one, but
22 certainly in one, there was a white

1 A. Yes.

2 Q. What does this mean?

3 A. It meant that it was somewhat sloppily
4 executed, but I did not see the kinds of
5 signs that I would expect to see if there
6 was a gross neurological defect of a type
7 that you might get with serious cerebral
8 damage.

9 Q. Was the Defendant at times like indifferent,
10 didn't care?

11 A. The performance would suggest he was not
12 invested in this test.

13 Q. Then you dealt with the wide range of
14 achievement tests; do you recall that?

15 A. Correct.

16 Q. And then you conclude above results reflected
17 significant relative deficit in reading
18 skills?

19 A. Correct.

20 Q. What does that mean?

21 A. It means that the reading sub test, he did not
22 do as well as he did on the spelling and

1 arithmetic sub test, which were clearly
2 at an average or better level. Reaching
3 a high school grade equivalent
4 performance, whereas his reading grade
5 level on this test was fifth grade. In
6 all cases, the achievement was adequate
7 for day-to-day living.

8 Q. You read Donna Roberts' letters, the
9 communication between the two?

10 A. Correct.

11 Q. Did you find that there was pretty good
12 communication and use of words, even
13 though some words he would not spell
14 correctly?

15 A. That is a reasonable statement.

16 Q. Now, what is the MMPI II?

17 A. The Minnesota Multi-Phasic Personal Inventory,
18 second revision is a true, false item
19 test, which allows one to make inferences
20 as to whether there are any serious
21 psychological or mental illness problems,
22 whether there are some character traits

1 MR. WATKINS: Thank you. Take ten
2 minutes and assemble outside. Do not express
3 anything or form any opinion until you get back
4 there.

5 (Jurors in recess at 11:45 A.M.)

6 (Jurors commenced deliberations at 11:55 A.M.)

7 THE COURT: To the alternates, we
8 have had a meeting at Side Bar, and at this point,
9 it is proper that I discharge you from any further
10 duties. We could not put you into the Jury at this
11 point if something would happen to one of them. We
12 would have to deal with that on its own merits. It
13 is only possible to put you in up to the point
14 where I sent them out just now.

15 I do wish to sincerely thank each of you.
16 You have been very attentive. I can't stress to
17 you how unusual that is. We get this many people,
18 and I have been watching the Jury, whenever I had
19 my eyes open, I have been watching the Jury and I
20 have never seen anybody other than giving full
21 attention to what is going on. It's unusual. You
22 folks have served us well. Thankfully, we did not

DONNA ROBERTS
TRIAL TRANSCRIPT

1 or not, not what the defendant does or doesn't do. Okay?

2 Very good.

3 Mr. Bailey, are you ready to proceed with your -- or
4 I'm sorry. Mr. Becker.

5 MR. BECKER: Yes, Your Honor.

6 THE COURT: I always give deference to age
7 is what it is; right?

8 MR. BAILEY: Judge, may we approach for a
9 second?

10 THE COURT: Yeah. Sure.

11 (Whereupon, a conference was held at the bench.)

12 THE COURT: I mentioned yesterday, both
13 sides wanted me to emphasize this, that the opening
14 statements are not evidence. Remember, I told you, nothing
15 the attorneys say throughout the trial is evidence. The
16 evidence will proceed and start right after the opening
17 statements. And the simplest way to cover the opening
18 statements is you should give equal attention to both sides,
19 whatever they say. Okay?

20 Mr. Becker.

21 MR. BECKER: Thank you, Your Honor.

22

23

* * *

1 OPENING STATEMENT ON BEHALF OF THE STATE OF OHIO

2 MR. BECKER: May it please the Court,
3 Mr. Juhasz, Mr. Ingram, Miss Roberts, the defendant in this
4 case, and most importantly, you, Ladies and Gentlemen of this
5 jury. First of all, I want to thank you, each and every one
6 of you, for this important civic duty that you are about to
7 undertake. I think, as we mentioned in the voir dire, I
8 believe probably short of serving your country in the
9 military this is the most important civic duty that you can
10 perform for this country and for your community.

11 In every criminal trial, as an attorney, you look
12 for a theme or you look for maybe a catch phrase to present
13 to the jury. Maybe you try and interwove it or interweave it
14 with some themes from a television show or a news headline or
15 historical context. And I sat long and hard trying to think
16 about what I should present to you as a theme for this case.
17 And after awhile, it became apparent. I don't have to
18 present a theme for you for this case because this defendant
19 spoke the theme, wrote the theme and did the theme.

20 This case is going to be about a relationship.
21 Actually, two relationships. The first relationship is
22 between Donna Roberts and Robert Fingerhut, and that
23 relationship started over 20 years ago when they got married.

1 They lived in the Miami, Florida region. They lived there
2 for a number of years. Eventually, they returned to
3 northeast Ohio. Miss Roberts is from Austintown. They moved
4 to Howland to 254 Fonderlac Drive. They operated the two
5 Greyhound bus stations in this area, the one in Youngstown
6 and one in Warren. At one point during their relationship
7 they opened a restaurant at the Youngstown bus station. And
8 at one point during the operation of those Greyhound bus
9 stations, this defendant met an individual by the name of
10 Nathaniel Jackson. Now you're gonna hear a lot of things
11 about Nathaniel Jackson. You're gonna hear his voice.
12 You're probably gonna read letters he wrote. You will hear
13 testimony about him.

14 Early on in this case, and I think when you were
15 voir dired, defense counsel repeatedly asked you not to find
16 her guilty because of some things that she said that were
17 sexually explicit. And to be quite honest with you, the
18 State is not going to ask you to find her guilty of anything
19 she or Mr. Jackson discussed that may be sexually explicit.
20 She's not charged with that. And what she does in her sexual
21 affairs, that's her own business. And we have no objection
22 to that. But that evidence is gonna be offered to you to
23 show the depth of her emotion and her love for Nathaniel

1 Jackson, a young, 29, 28-year-old black male from the
2 Youngstown area who she fell in love with. And it was in the
3 course of that love that, really, she wrote the theme for
4 this case. And it involves the three most basic human
5 emotions. Love, hatred and greed. And from her own words,
6 from her own writings, and from her own actions, you will see
7 how she acted upon those three emotions.

8 And what you'll find in this case essentially is
9 that she and Mr. Jackson thought about it, they talked about
10 it, they wrote about it, and they did it. And the evidence
11 in this case is basically going to show that sometime in
12 September of 2001 Nathaniel Jackson was sent back to the Ohio
13 state penitentiary system. This was very depressing to
14 Mrs. Roberts. And you'll read about it in her letters.
15 You'll read about how she missed him, how she cared about him
16 and, yeah, there's some things in there about the sexually
17 explicit stuff. It really has no importance in terms of the
18 actual deeds that they did, but it does have importance to
19 show you the depth and the connection that those two had with
20 each other and, really, the love that they had for each
21 other.

22 You'll discover that they were intimate, that in
23 fact they were lovers. They hid their relationship from

1 Mr. Fingerhut. They snuck around.

2 And the testimony will clearly show that while
3 Mr. Jackson was incarcerated in the Lorain Correctional
4 Center, which is on the west side of Cleveland, they
5 formulated a plan to eliminate Robert Fingerhut, to kill him.
6 The motive for this killing was pure greed, \$550,000 in life
7 insurance policies. You will be introduced and the evidence
8 will show that there were two insurance policies. They will
9 show and she will discuss in her conversations and letters
10 the thing with all of the zeros and how she talked to her
11 accountant about the things with all the zeros to make sure
12 that it was paid up until the end of the year.

13 You'll hear testimony and you'll see exhibits from
14 Mr. Jackson talking about what he'll do with those proceeds,
15 how he would like a new Cadillac Deville, and you'll hear and
16 read her words which promise to get him a Cadillac Deville.
17 In fact, she'll tell you in her letters about how they should
18 get a personalized license plate for Mr. Nate Jackson on his
19 new Cadillac Deville.

20 Now, the first part of this case will be devoted to
21 hearing it. You will hear 19 phone calls from the Ohio state
22 penitentiary system. We will introduce witnesses who will
23 tell you that when an inmate is incarcerated at the Lorain

1 Correctional Institution, they are given a pin number. It's
2 sort of like a bank code number. And when you make a call
3 from the institution, which you're permitted to do or
4 Mr. Jackson was permitted to do every Thursday and Saturday,
5 you have to enter that pin number. That is recorded. And
6 you will hear on the conversations that they are being
7 recorded. You'll hear a prerecorded voice at the first part
8 of those conversations and in the middle of those
9 conversations advising that this call is made from the Lorain
10 Correctional Institute and may be recorded or monitored.
11 Mr. Jackson and Miss Roberts, at their peril, disregarded
12 those warnings.

13 And the evidence will show and those phone calls
14 will show that initially Mr. Jackson was to be incarcerated
15 until April of 2002. And again, you'll hear words and
16 letters from this defendant that that saddened her because
17 she was in love with Mr. Jackson and she needed Mr. Jackson
18 there. However, on October 25th, 2001, the evidence will
19 show Nate Jackson found out that he was getting out of prison
20 on December 9th, 2001. He was given credit for time served
21 that he spent at a place called CCA, which is in Youngstown,
22 which is a place he was incarcerated at before he went to
23 Lorain Correctional Center.

1 And on October 25th, 2001, in addition to writing
2 letters to this defendant advising her that he was getting
3 out, he called this defendant. And he called her collect
4 because that's the only way you can call someone from the
5 Ohio state penitentiary is collect. She accepted the calls.
6 And you will hear Nate Jackson describe how -- well, he will
7 ask her what does she want for Christmas. And her reply is,
8 "You." She wants Nate Jackson for Christmas.

9 And Nate Jackson will tell her in that phone call
10 he's getting out December 9th, that she's gonna have him for
11 Christmas. And she will squeal like a little teenager with
12 delight that Nate Jackson is getting out.

13 And in that same conversation, you will hear
14 Mr. Jackson say he's going to do it the next day. He's gonna
15 go ahead and do it the next day, referring to the murder of
16 Robert Fingerhut.

17 And this Defendant's reply is, "Oh, no. Don't do
18 that," or, "What are you talking about?"

19 Her reply is, "Oh, I just wrote to you that I didn't
20 think you meant it."

21 And you'll read that in the letters, the numerous
22 letters of which there are almost 300 in this case.

23 You'll see during these phone calls and these

1 letters that she sends him money. She sends him things that
2 he needs so he can buy things from the commissary. She even
3 goes so far as to get him a subscription to the Youngstown
4 Vindicator because, my goodness, he's in prison. He doesn't
5 know what's going on in Youngstown. He needs to know the
6 news.

7 The next phone call you'll hear will be on November
8 8th, 2001. And you will find that this defendant had written
9 a letter dated November 11th, 2001 and you will hear the next
10 part of this case which is her hatred for Robert Fingerhut.
11 And you will hear, quote, you will read her words, quote, in
12 the letter of November 11th, 2001, "I would really love for
13 him to see me sucking that dick of yours just before he
14 leaves planet Earth. I wouldn't have to yell or swear or say
15 a word. That would be more than a sufficient send-off."

16 And during the phone call of November 8th, 2001,
17 Nate Jackson will comment about reading that letter of
18 November, that November 8th letter. And Nate Jackson will
19 say, "I was reading a letter where you wrote you would like
20 him to see you suck my dick before it goes away. I love
21 that." I asked if you -- "I asked you if we could do it like
22 that in my letter."

23 And on the phone you'll hear this defendant say,

1 "Mmm, of course."

2 She wants him dead and she wants him dead now.

3 During the course of those telephone calls, they do
4 decide to get a little bit smarter and they will eventually
5 refer and debate -- degrade Mr. Fingerhut's life to a
6 package. They will refer to Mr. Fingerhut as "the package"
7 and the death of Mr. Fingerhut and the murder of
8 Mr. Fingerhut will be referred to as the delivery of the
9 package.

10 On November 22d, 2001, there's a phone call. Mind
11 you, this is less than three weeks before Mr. Fingerhut was
12 ultimately murdered on November 11th, or I'm sorry,
13 December 11, 2001. Nate Jackson has to take care of
14 something else before he kills Mr. Fingerhut and that is he
15 has to have sex with this defendant. And Mr. Jackson says
16 that he was talking to some friends in prison and there's a
17 place called the Wagon Wheel Room in Boardman, Ohio. And he
18 tells this defendant to go put a deposit on the room because
19 it's quite a popular place for lovers in the area, seeing as
20 how it has a jacuzzi filled tub or a large, rather, walk-up
21 jacuzzi and it's sort of a lovers' rendezvous, a lovers' nest
22 in the area. He needs her to go there and make a deposit and
23 get the room for them.

1 The State will present to you evidence from credit
2 cards and receipts that, in fact, she went to the Wagon Wheel
3 and she got the room.

4 And Mr. Jackson requests for their little love
5 rendezvous that she wear some red panties because he wants to
6 see her in a red thong panties and that would be so romantic.
7 Well, you'll hear testimony from the people who rented that
8 room to this defendant, people who saw this defendant with
9 Mr. Jackson there, and they will also tell you that after
10 they checked out, low and behold they found some red thong
11 panties in the room which was rented, by the way, for
12 December 9th, Mr. Jackson's first day out of prison.

13 The evidence will show that she checked out that
14 room, she put the deposit on it, she left a pair of red thong
15 panties. You'll hear testimony from the credit card receipt
16 or about the credit card receipt and you'll hear testimony
17 about finding those red thong panties that she left there.

18 Now, back to the phone call of November 22d of 2001.
19 Nate Jackson reiterates on that phone call that he is going
20 to kill Robert Fingerhut the next day. And he says -- or she
21 says, rather, "I'm afraid, Nate."

22 And Nate Jackson asked her on that phone call what
23 she's afraid of. She doesn't say she's afraid of losing

1 Robert Fingerhut, the man she's lived with for twenty some
2 years. No. She's afraid of one thing, of losing Nate
3 Jackson. And she says, "I can't afford to lose you again."

4 She doesn't want Nate Jackson to go back to prison
5 again because it's tearing her up. And you'll read through
6 the course of these letters how much it pains her that Nate
7 Jackson is in prison.

8 Nate Jackson goes on to explain that he knows, in
9 fact, what he's doing in this case. And this defendant will
10 tell you on that phone call or tell Nate Jackson in that
11 phone call and you'll hear more evidence of their plan or the
12 delivery of the package. And this defendant says, "But what
13 was the story with the trunk and the handcuffs? That's too
14 involved. You're going to leave hair. You're going to leave
15 prints."

16 She's concerned about what evidence they may leave
17 if they commit this crime the way Mr. Jackson has discussed.

18 On November 24th, 2001, once again, Mr. Jackson
19 makes a collect call that's accepted by this defendant. And
20 you'll hear that telephone call. And Nate Jackson assures
21 her that he knows the laws in the State of Ohio. They won't
22 have his DNA so they don't have to worry about DNA.

23 She also goes on to discuss a number of cars that

1 she would like to buy for him, maybe a Lincoln, maybe a
2 Cadillac, and they talk about what he has to do the next day
3 after he gets out of prison. They both agree, as they do on
4 a number of occasions, that they'll talk about it later when
5 he gets out because they do know that the phone calls are
6 being recorded. Because each and every phone call, there is
7 a warning telling them that the phone calls are recorded.

8 Now we get to the most intriguing of the phone calls
9 you'll hear. December 8th, 2001. One day before Nate
10 Jackson gets out, three days before Robert Fingerhut is
11 murdered in his home in Howland Township. And he tells her
12 that it's better to be an older woman's heart than a younger
13 woman's fool. And she makes arrangements to spend the night.
14 They've already got it planned out. If you read the letters
15 and hear the phone calls, she's gonna tell Mr. Fingerhut, the
16 excuse she's going to give him is apparently she has a niece
17 that lives in the Cleveland area. And she's going to tell
18 Mr. Fingerhut that Saturday night, December 7th -- or I'm
19 sorry, December 8th -- she's gonna drive up to Cleveland and
20 spend the night with her niece and go to church the next
21 morning when, in fact, you'll read from the letters and the
22 phone calls that Mr. Jackson gets out of prison on Sunday,
23 December 8th, 2001, and he's released at 8:00 in the morning.

1 She's gonna pick him up and bring him back to the Wagon Wheel
2 and have their rendezvous. So she lies to Mr. Fingerhut
3 about where she's going.

4 She makes the arrangements. And on the December 8th
5 phone call, Mr. Jackson makes sure that they're going to
6 spend the night together. And she promises him that they
7 will.

8 And during that December 8th, 2001 phone call, in
9 the middle of the conversation, in fact, quite humorously,
10 although sadly for Mr. Fingerhut, Nate Jackson makes one
11 request of Donna Roberts for when he is going to kill
12 Mr. Fingerhut. And his quote is, "There's only one thing I
13 need. I need to be in the house."

14 And she says, "No, not in the house." She doesn't
15 want him killed in the house.

16 And finally, this defendant says, "Well, we'll talk
17 about it later," knowing full well she's going to see him the
18 next day.

19 You will hear the testimony and see the exhibits of
20 their first night together at the Wagon Wheel. Jose Flores
21 will identify the defendant as getting that room. He will
22 identify Mr. Jackson. You will also hear the testimony about
23 how she got that room and about the red thong panties. You

1 will hear their thoughts. They will express them to you.
2 They will talk about doing it.

3 The next piece of evidence, and the biggest portion
4 of evidence, you will have a box about the size of that
5 bankers box filled with letters. And those letters are the
6 next step of their hatred of Mr. Fingerhut, their love for
7 each other and their greed. And in those letters, she writes
8 with her own words and her own handwriting. First you'll
9 hear of her own hatred for Mr. Robert Fingerhut. You'll have
10 all these letters and you'll have all the time you need once
11 you deliberate to read these, this evidence. But I want to
12 give you a glimpse and a taste of the hatred that this
13 defendant had for Robert Fingerhut.

14 Quote, "Last night he said he wished he was dead.
15 That is one wish I hope comes true for him. I can't even
16 stand to look at him anymore. I hate it when he talks to me
17 too. I hate to look at him. I can't stand to even handle or
18 do his laundry anymore. I hate his face, hair, nose, eyes,
19 body. Everything about him makes me nauseous."

20 Her words. Her handwriting.

21 Then she says, "And, yes, sneaking to see you a
22 couple of hours doesn't do it. It leaves us both with no
23 real life together. And when you go your way, you have to

1 fend for yourself and eat alone and sleep alone and be out
2 with the wolves," because Nate Jackson is a street person
3 from the streets of Youngstown.

4 "And me, I exist in hell on earth. Like last night,
5 I got so sick of just looking at him and hearing the same
6 shit over and over and smelling his breath and every other
7 little thing. It's all bad. And seeing his skin and
8 watching him walk or breathe. I can't hold in my disgust and
9 contempt for him well at all."

10 Once again, her words. Her writing.

11 "So there's one extra time in my life I had to look
12 at him. Help me. That's one too many times for me. I have
13 never lived like this with so much animosity and hatred."

14 That's her telling you how much animosity and hatred
15 she has.

16 "And it's really hard since he has been controlling
17 the money for the last year or so."

18 "We'll get to the greed in a minute.

19 On October 24th, 2001, she writes to Nate Jackson in
20 prison. "It is his birthday. He is 56." That's true.
21 Mr. Fingerhut did turn 56 on October 24th, 2001, the last
22 birthday he was alive.

23 She says, "He's 56. I can't stand to say his name

1 anymore. He is so totally crude now. My only birthday wish
2 for him is that this should be his last birthday."

3 And that's that. And, in fact, it was Robert
4 Fingerhut's last birthday.

5 Quote, "It's enough I have to go through with this
6 schmuck now, Robert. Sometimes I almost feel sorry for him.
7 Not. It's a good thing all the 38s were in the car because
8 when he slapped me real hard, I would have lost it and
9 emptied that all into his mouth."

10 Once again, these are her words. At one point,
11 she's referring to cleaning in a letter she writes to
12 Mr. Jackson. "My heart just isn't in it, especially because
13 he keeps saying it looks like a N blank blank blank blank
14 blank R house just because of some dust and stuff. Well, let
15 it look that way I say because soon it will be just that if I
16 have anything to say about it. Soon the door is going to
17 open and the wrong man is going to enter. I hope some day I
18 can just roll over and say good night to you," referring to
19 Mr. Jackson.

20 "He gets me so sick now I can barely stand it
21 anymore. I've been living with a moron for the last 20
22 years."

23 Once again, the testimony and the evidence will show

1 that they reduced Mr. Fingerhut's life to nothing more than a
2 delivery of a package. It was gonna be like a UPS delivery.
3 Knock on the door, be done with it, delivery's done.

4 These are her words again. "Ok. I'll only say
5 this. Go ahead and take care of business. I'm sorry about
6 the worry over the package. It's just such a major move and
7 with very serious consequences and severe. I can't stand
8 even to think about losing you again," referring to
9 Mr. Jackson.

10 "Do whatever you decide is best. If our prayers are
11 answered, we will be together next Thanksgiving."

12 She talks about enjoying the first snow of the year
13 together with Mr. Jackson. She talks about waking up
14 Christmas morning next to each other with Mr. Jackson.

15 "I've been thinking a lot about the delivery of that
16 package and I get real scared. All I worry about, though, is
17 losing you forever to prison. And the more complicated the
18 plan, the more that can go wrong. A fingerprint, a hair, an
19 article of clothing, a witness, the weapon. I will be in the
20 line of fire, too, and could end up you know where. We have
21 to make certain that all of this is as fool proof as it can
22 be. I guess we'll get it down when you get home. I'm so
23 worried about the delivery. I don't want to see you in

1 orange again, Nate. Do you really have the nerve and the
2 guts to deliver this package? What do you think about when
3 you think of doing it? Will you tell me everything about it?
4 It's a real shame that they have such advanced DNA testing or
5 I'd tell you to spit on the package while you were delivering
6 it. That's a mean thing to say and it's really not my
7 character to say such things, but this package just begs for
8 it, don't you think?"

9 Now, in addition to the hatred of Mr. Fingerhut, she
10 also has to feign grief because Mr. Fingerhut will die. How
11 is she going to feign this grief? She tells you how she's
12 going to feign this grief. She writes it in her letters.

13 "Once again, I worry about my reaction and any
14 authority's reaction to my reaction. I mean how do you
15 appear to be sad when you feel like throwing a party, but I
16 know I can do whatever I must for all to be well. I'm so
17 worried to think how I will be able to even act sorrowful.
18 There will be a lot of interrogations and perhaps a lot of
19 suspicion. Can we handle that?"

20 And quote, "It's all gonna come down to when I get
21 that call. And I can handle that because it means everything
22 to both of us," referring to Mr. Jackson.

23 "I am not even worried about it any longer because

1 I've thought about it a lot and I'm prepared. Instead of
2 laughing and cheering, I will concentrate on losing someone
3 that I would go nuts over and react accordingly."

4 That's how she's gonna react when she finds out
5 Mr. Fingerhut's dead.

6 Now the State is not required to show motive. But
7 in this case, she wrote the motive, she spoke the motive.
8 And that motive is on one of those three emotions, one of
9 those strong human emotions. And that emotion is greed. The
10 State will introduce evidence that will show there were two
11 life insurance policies out on Mr. Fingerhut's life, \$550,000
12 in life insurance on Mr. Fingerhut.

13 You will also hear testimony about the financial
14 condition, through her words, of the Greyhound bus terminals.
15 And I want you to keep this case in the context of
16 September 11, 2001. All of us remember that tragic day.
17 Probably each and every one of you remembers where you were
18 at. But the evidence in this case will show and the facts of
19 this case will show and you'll recall travel was way down.
20 People weren't going anyplace. People weren't flying. They
21 weren't even taking the buses. And she'll write in her
22 letters about how business is down, how they're not making
23 much money at the bus station. You'll hear testimony that

1 she really doesn't know much about the business. In fact,
2 the reason she doesn't work in the Youngstown terminal is
3 because she doesn't know how to use the computers. So what
4 better way to get out from this financial debt and to get out
5 from this bad business than to collect \$550,000 in insurance
6 money?

7 You will hear testimony about how her and
8 Mr. Fingerhut, it's in her own letters, had 52 credit cards.
9 You'll hear testimony about she refers to Mr. Fingerhut as
10 the Grinch, about how he controls her spending. She only
11 gets so much a month, a week, and she's used to having money
12 whenever she wants. But times are bad in late December and
13 November and October of 2001. People aren't traveling.
14 People aren't taking the Greyhound bus. You'll hear how the
15 business is down 30, 40, 50 percent. Through her own words
16 she'll tell you that. She's used to having money whenever
17 she wants. She's hoping that those days will return again
18 soon. And she tells Mr. Jackson that and her problems with
19 money and how she hopes that those days when she can spend
20 money again will return soon.

21 And she says, "Do whatever you want to him ASAP.
22 Amen. Yes, you can do whatever you want to accomplish our
23 goal."

1 She writes in the one of the letters, "I found out
2 that those things with the zeros are paid up to the end of
3 the year as per our accountant's suggestion. Yes, I didn't
4 want you to worry about that," writing to Mr. Jackson.

5 Why would Nate worry? Because you're gonna find out
6 he's gonna get a Cadillac out of this deal. He talks about
7 dreaming of a Cadillac Deville. And she talks about getting
8 him personalized plates. Nate Dog or Nathaniel or whatever
9 else might pop into their minds. In fact, I think in one of
10 the letters she refers to a personalized plate that says D
11 loves N. They'd like to get a little license plate to
12 express their love to the world. And she'll talk about that
13 and talk about how she'd like to express their love to the
14 world. What will people think when they see Mr. Jackson and
15 I walking down the street together, walking together, walking
16 through the malls? An older white woman like myself with a
17 young black man. We'll have to hold hands a lot so people
18 will know our, show the world our love.

19 Now, eventually this defendant looks into getting
20 Mr. Jackson the Cadillac that he so desires. She writes in
21 one of her letters, though, there's going to be some problems
22 because her and Mr. Fingerhut are leasing two Chrysler
23 300 Ms. Pretty nice cars. You'll hear testimony from

1 witnesses who will tell you that those cars were in
2 Mrs. Roberts' name. And what you're gonna hear basically is
3 at one point in their relationship, and she'll tell you, that
4 Mr. Fingerhut requested that all of the assets that Miss
5 Roberts and he had be placed in her name. And the first
6 thing they did was they got an official divorce.
7 Mr. Fingerhut was worried about being sued through the
8 terminals and losing everything. So they got this divorce of
9 convenience basically or really for financial reasons. They
10 still lived together. They transferred the house to her
11 name. She signed all the leases to the two vehicles they
12 owned. Even the Greyhound terminal, the Greyhound bus
13 business, was in her name. So she had everything. But don't
14 be mistaken. Mr. Fingerhut still drove the cars. He took
15 care of them. In fact, we will present testimony from Barry
16 Ricker and Carmen Olivia from Preston Auto Group out on the
17 strip out in Niles who will tell you that Mr. Fingerhut did
18 all the negotiating for the contracts and the leases, that
19 Mr. Fingerhut brought the vehicles in for service. That
20 Preston has a deal where if you buy a car, they'll wash it
21 every week or every month and detail it. And Mr. Fingerhut
22 predominantly was the one who brought those vehicles in. So
23 don't be fooled by who owns what because Mr. Fingerhut still

1 lives in that house and he still drives those cars.

2 But what you're gonna hear this defendant tell Nate
3 Jackson in one of those phone calls is that she can't really
4 get out of the lease after they kill Mr. Fingerhut so they'll
5 have to slum around in these 2000 and 2001 Chrysler 300 Ms.

6 Now Mr. Bailey and I were very forthright with you
7 when we started this case, each and every one of you when you
8 sat in that chair and were voir dired in this case. We told
9 you right from the beginning she's not the shooter. She's an
10 aider and abetter. And the Court will define that term for
11 you, but we usually use that term to mean help.

12 She talks at one point about someone else doing it.
13 And you'll read in the letters that she talks about getting a
14 professional delivery service. But Mr. Jackson is confident
15 that he can pull this off himself. And at one point she
16 says, "I really do believe you intend on taking care of
17 business. Here's how I feel about it. What size gloves do
18 you wear? Ok?"

19 Because Mr. Jackson is going to need some things to
20 commit this crime. He's going to need some gloves, he's
21 going to need the firearm, he's going to need to be in the
22 house, and he's going to need a ski mask. You will hear and
23 read her words. She looked all over. In fact, in one of her

1 letters, she said she had to look for four stores for that
2 ski mask. But you know what? She found it. She was real
3 proud of herself, proud that she got it for Mr. Jackson. And
4 she got the gloves. No, not the thick ones. She got thin
5 ones because they're easier to work with.

6 You'll hear testimony and you'll see exhibits that
7 she had guns. Now unfortunately, we never recovered the gun
8 that killed Robert Fingerhut. But, quite conveniently, about
9 two or three weeks before Mr. Fingerhut's murder, she reports
10 a gun stolen and to be stolen by a guy named Santiago Mason.
11 Boy, she writes these letters what a terrible guy he is. He
12 did all these terrible things. We are gonna hear from Mr.
13 Santiago Mason. Mr. Santiago Mason is gonna get on that
14 witness stand and he's gonna tell you, "I went to her house
15 one time. She wanted to have sex with me,"
16 Mr. Santiago Mason being the persuasion that she prefers, a
17 large black man. And Mr. Mason is gonna tell you, "I didn't
18 steal anything from her. She tried to set me up for murder."

19 And Mr. Mason will sit there and tell you how angry
20 she was when he rebuffed her sexual advances. And quite
21 coincidentally, a few days later, she goes to the Warren
22 Police Department to report a firearm stolen by Mr. Santiago
23 Mason. And she writes in her letters, "Oh, he said he's

1 gonna do bad things with it." Why not create a third party
2 to make it look as if the murder was committed not by Nate
3 Jackson and Donna Roberts, but by this bad Santiago Mason?

4 Now she goes on in her letters to aid and abet
5 Mr. Jackson. And she says, "I will have the gloves and the
6 rest waiting for your arrival. But why the handcuffs? I
7 would feel better if I knew this was gonna be quick and
8 painless."

9 In the same letter she says, "I would really love
10 for him to see me sucking that dick of yours just before he
11 leaves plant Earth. I wouldn't have to yell and scream or
12 say a word. That would be more than a sufficient send-off."

13 She also asks when she can't find a ski mask at one
14 point, she asks Mr. Jackson, "I can't find a ski mask because
15 the places I'm shopping at only have the knit caps. Any
16 suggestions?"

17 Finally she found that. She was so proud of
18 herself.

19 And the last thing that Nate Jackson needed and
20 you'll hear on that phone call December 8th, the one request
21 he made was that he needed to be in that house.

22 And the evidence and the testimony from the Howland
23 Police Department will be that at about midnight on

1 December 11th, 2001, they received a phone call from 254
2 Fonderlac. Miss Roberts had put herself into the mind set
3 that she needed to be like she talked about in the letters.
4 She wasn't gonna be happy and cheery. She had to think about
5 losing someone that she really cared about. And she cried
6 and cried. And the police will tell you she was so upset
7 they could hardly understand her. But they'll also tell you
8 that when they asked her to go to the bedroom in the house
9 that as they discussed the scene and what they had discovered
10 and Mr. Fingerhut with three bullet wounds, one through his
11 hand that entered the shoulder, one coming through the back
12 of his shoulder and then finally a fatal shot to the head,
13 they'll tell you that when they started to discuss things
14 that all of a sudden the sobbing and the crying stopped and
15 it was as if she was listening at the door. And they'd go
16 back and check on her and she'd start crying again. "How
17 terrible. My poor Robert."

18 "Of course the police didn't know that there were all
19 these phone calls and letters at that time. They had no
20 reason to suspect Miss Roberts.

21 And the police will also tell you that they searched
22 that house. They walked around it. They looked at the
23 windows. They looked at the doors. There was no forced

1 entry. Someone had stealthily snuck in there or perhaps was
2 waiting for Mr. Fingerhut when he got home.

3 And the evidence and the testimony will show that
4 this defendant then gave statements to the Howland Police
5 Department. And she told them what she did. "Well, I went
6 out shopping and I went to Wal-Mart. In fact, here's my
7 receipt. Oh, I did have dinner at Red Lobster that night. I
8 went out and had dinner with Red Lobster. And Mr. Fingerhut,
9 well, he works the late shift at the Youngstown bus station
10 and he doesn't get to leave until the last bus comes in about
11 9:00."

12 And the State will present testimony to you showing
13 you that Mr. Fingerhut left the Youngstown terminal at about
14 9:30. In fact, you'll have the video tape from the security.
15 Now, the times are a little bit off on the tape, but you'll
16 hear testimony from one of the security guards that, in fact,
17 Mr. Fingerhut left about 9:30, his usual time. He was really
18 a creature of habit.

19 You will see phone calls between Miss Roberts and
20 Mr. Jackson because Mr. Jackson had this defendant's cell
21 phone. You'll have the records and the times. And when Miss
22 Roberts is questioned about this Nathaniel Jackson, she says,
23 "Oh, I haven't seen him since Sunday. I picked him up from

1 prison, but I haven't seen him since then."

2 Well, guess what? The State will present to you
3 evidence that she was with Mr. Jackson all day on
4 December 11th. The State will present testimony to you from
5 Kris Ellington who owns a hairstyling place right beside the
6 Warren bus terminal. Miss Ellington will tell you that this
7 defendant came in with an individual, Nate Jackson.

8 A bus driver who works for the Greyhound who stops
9 in at the 5:00 stop, he's the last stop at the Warren
10 station, he will tell you that when he came to, into the
11 station, he saw this defendant with Nate Jackson. Funny how
12 Miss Roberts neglects to tell the Howland Police that she was
13 with Mr. Jackson all day the day of the murder.

14 Then you will hear the testimony from Jill Kenyon.
15 She is a waitress at the Red Lobster out by the Eastwood
16 Mall. And Miss Kenyon will tell you, "Yeah, I waited on a
17 woman," who she identifies. And she'll also identify that
18 she was with Nate Jackson. She kind of forgot to tell the
19 police she was with Nate Jackson all day. She lied. And
20 that's what the evidence will show.

21 They had it all planned out. The gloves, being in
22 the home when Mr. Fingerhut arrives, the gun, reporting the
23 gun mysteriously missing a few weeks before. It's all

1 planned out. The handcuffs. But there was one thing they
2 didn't count on, one part of their plan that the evidence
3 will show didn't go the way they wanted it to. Mr. Fingerhut
4 was not gonna leave his house. When he walked into that
5 house and saw this black male there with a gun, he fought and
6 he struggled. And that's what the injuries will show you,
7 the hand up, the bullet through the webbing of the hand, the
8 bullet into the chest, the grazing wound on his shoulder as
9 he was trying to fight with his assailant.

10 And contrary to what Mr. Jackson's concerns and
11 knowledge of Ohio law and the DNA was, he was wrong. And she
12 was wrong. Because the evidence is going to show that Mr.
13 Jackson did leave DNA. He left DNA everywhere and
14 fingerprints everywhere. And the worst part about this case
15 is not what happened before. It's what happened afterwards.
16 Because Miss Roberts will tell you how grieving she was, how
17 terrible it was and you'll hear the police say, "Oh, she was
18 crying December 11th around midnight when we got there."

19 But she forgot to tell the Howland Police Department
20 one other piece of evidence that you'll have. She checked
21 Nate Jackson into a Days Inn Motel in Boardman between 10 and
22 12 on December 11 because Mr. Jackson had shot his finger
23 during the struggle and he had shot his index finger on his

1 left hand. He was injured. And she took him down to
2 Boardman, paid for it with her own credit card. Kind of
3 forgot to tell the Howland Police about that part.

4 When questioned by the Howland Police about
5 Mr. Jackson, "Oh, Nate would never do such a thing."

6 And the evidence will show that they made one other
7 mistake. It was a pretty big one. In addition to talking on
8 the phone, despite these repeated warnings, and they were
9 pretty careful on the phone, albeit, I'll admit that, they
10 didn't get rid of the letters. He kept all of hers and she
11 kept all of his. And in fact you'll see letters that she
12 wrote. In her letters, "Maybe we should get rid of these.
13 We should destroy all these parts or at least the pages where
14 we talk about Robert."

15 But she couldn't give 'em up. She couldn't get rid
16 of 'em because there was so much love for Nate Jackson in
17 those letters. And she'll tell you that. It's in her
18 letters. She couldn't destroy them because of the love that
19 she felt from Nate in those letters. And fortunately for the
20 Howland Police and you and the State of Ohio and for Robert
21 Fingerhut, we have those letters. And you will see those
22 letters. They are the evidence in this case.

23 You will hear a lot of testimony from forensics

1 people. The room that she got down in Boardman, the Days
2 Inn, Paul Monroe and this detective, Sergeant Dillon, went
3 down there. Paul Monroe got in a dumpster, he pulled out the
4 trash and he found gauze, tape, bandages from where Nate
5 Jackson had taped up his finger. And of course it's Nate
6 Jackson's DNA. BCI experts came in. They found Nate
7 Jackson's fingerprints in that room that was rented by her
8 for a week. Just like their plan. Just like the discussions
9 in the letter. He needed to get a place to stay to sort of
10 stay low until they could move in together before Christmas.
11 I guess apparently two weeks is all you need.

12 But the evidence in this case will show beyond all
13 doubt what I started out this morning telling you. They
14 thought about it, they talked about it, they wrote about it,
15 and they did it. And at the end of this case, it will be
16 Mr. Bailey and I's sworn duty to ask you to return verdicts
17 of guilty to all four counts, aggravated robbery, aggravated
18 burglary, aggravated murder with a death specification and
19 another count of aggravated murder. They planned it. They
20 set it up. Even though it was her house, it was
21 Mr. Fingerhut's home as well. It was his home that was
22 burglarized. It was his home that Mr. Fingerhut came home to
23 where he found Mr. Jackson stealthily planted in there in

1 preparation of this plan. It was his car that he drove. He
2 may not have owned it. They may not have been in his name,
3 but the evidence will show they were his just as much as they
4 were hers. At the close of this case, we will ask you to
5 return verdicts of guilty to each and every count and each
6 and every specification.

7 I want to thank you very much for your attention.

8 THE COURT: Thank you, Mr. Becker.

9 Does the defense wish to address the jurors?

10 MR. INGRAM: Yes, Your Honor. Donna
11 Roberts, pursuant to statute, will give the defense opening
12 statement.

13 OPENING STATEMENT ON BEHALF OF THE DEFENDANT

14 THE DEFENDANT: Good morning. Will the
15 real Donna Roberts please stand up? Ladies and Gentlemen,
16 the real Donna Roberts stands before you. The testimony and
17 evidence will establish that I played no part in Robert's
18 death. The Donna Roberts you'll hear portrayed in the
19 letters and on those tapes is not the real Donna Roberts.

20 My attorneys will test the State's evidence and ask
21 important questions in cross examination. Please, please
22 listen carefully for those questions.

23 Perhaps I'll have more to say later. Regardless, I

1 you.

2 (Whereupon, a recess was had commencing at 2:30 p.m. and
3 concluding at 2:47 p.m.)

4 THE COURT: Okay. I believe we're ready
5 to proceed. Call your next witness.

6 MR. BECKER: Your Honor, the State would
7 call Santiago Mason.

8 WHEREUPON,

9 SANTIAGO MASON,

10 having been first duly sworn, according to law, was examined
11 and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BECKER:

14 Q All right. Would you please introduce yourself to
15 this jury?

16 A My name is Santiago Mason.

17 Q All right. And Mr. Mason, you still may want to
18 maybe scoot a little bit closer.

19 A Santiago Mason.

20 Q Okay. Very good. Mr. Mason, where do you live at?

21 A Right now, I live at 407 Southern Boulevard,
22 apartment 215.

23 Q And Mr. Mason, what is your date of birth?

1 A 11-13-68.

2 Q Mr. Mason, I want to direct your attention to
3 October, November, December of 2001. Actually, I guess just
4 the fall, September, October, November of 2001. Were you
5 going to the Warren bus station at certain intervals at that
6 time?

7 A Yes.

8 Q What was your reason in going to the Warren bus
9 terminal?

10 A I have family live in Cleveland. I'm from Cleveland
11 myself.

12 Q Okay. And is that the transportation method you
13 would use to go visit that family?

14 A Yes. Yes.

15 Q While you were going to -- well, how often would you
16 use the Greyhound station here in Warren?

17 A Like on a, right now I don't use it, but back then,
18 I was using it like every other weekend.

19 Q All right. And when you would go to the Warren bus
20 station, did you become familiar with any of the employees
21 there or any of the people that were there?

22 A Yes.

23 Q Do you recall who you became familiar with?

1 A Yes.

2 Q Do you recall the name?

3 A Donna Roberts.

4 Q All right. And just in your own words, tell us how
5 you got to know Donna Roberts.

6 A Well, I was going to Cleveland and she was writing
7 her boyfriend, Mr. Jackson, at the time and there was a
8 picture and I was incarcerated myself in Belmont Institution
9 myself so I remembered the background. I was like just
10 passing conversation since I was sitting there. And I was
11 like, "That picture like he in Belmont."

12 And she's like, "He is. Do you know him?"

13 I'm like, "No, I don't know him, but I know the
14 background of the picture because I was, I took pictures in
15 that room before."

16 And we just started talking and everything.

17 Q So you became familiar with Miss Roberts through
18 some previous incarceration that you had been in trouble for?

19 A Yes.

20 Q And can you tell this jury what you were
21 incarcerated for?

22 A Oh, I was incarcerated for not watching my parole
23 officer. They put it for escape. Up under the new law, it's

1 escape right now.

2 Q All right. And were you on parole at the time?

3 A Yes, I was on parole at the time.

4 Q All right. Now, at some point, I believe in
5 November of 2001, did Miss Roberts offer to do something with
6 you?

7 A Oh, she just told me to stop back at the bus stop
8 when I get back from Cleveland. And we just started talking
9 and that's kind of what, we started getting better with each
10 other and we, I sat there until she got off work and we got
11 in her car or whatever.

12 Q Now do you recall approximately what date of the,
13 what date in November?

14 A It was a little after my birthday.

15 Q So sometime after November 13th?

16 A My birthday is the 13th of November so it was like a
17 couple days after my birthday.

18 Q And, in fact, you took her up on her offer to meet
19 her after work?

20 A Yes.

21 Q And can you tell this jury in your own words what
22 you did that particular day?

23 A Well, after she got off, she locked up the building

1 and everything. We got in the car, she had a red Chrysler,
2 and I thought she was pulling out a pack of cigarettes and
3 she pull out a big old pack of fat joints. And I'm like, I'm
4 thinkin' she's gonna smoke a cigarette so I rolled my window
5 down because I don't smoke cigarettes at all. So we ridin'
6 and I smell, I'm like, "What you smokin'? You smokin' weed?"

7 And she like, "Yeah."

8 I'm like, "Oh, man, you a live old lady."

9 You know what I'm saying? So she throw on her
10 little CD player and started playing thug music and stuff.

11 I'm like --

12 Q What kind of music was it?

13 A Thug music.

14 Q Okay. What is thug music?

15 A Like Trick Daddy, I'm A Thug, whatever.

16 Q Okay. Is it what we call rap music?

17 A Yes. Rap music.

18 Q Okay.

19 A Yeah. And I asked her, I'm like, "What is you doin'
20 listening to this type of music, you know what I'm saying, at
21 your age"?

22 She like, "My boyfriend hook me onto this kind of
23 music," or whatever.

1 Q And at that time, you knew her boyfriend to be?

2 A Her boyfriend was Nathaniel Jackson at that time.

3 Q And that's the same person --

4 A That's the same guy I seen she was writin' and the
5 picture that was on the desk and everything.

6 Q And what did you do after she drove you around?
7 Where did you go?

8 A Well, we went into her house out there.

9 Q And do you know where her house was?

10 A In Howland.

11 Q All right. I'm gonna show you what's been marked
12 for purposes of identification as State's Exhibit 126 -- 126,
13 104, 249 and 124. I'm gonna show you up here on this screen
14 what's been marked for purposes of identification as State's
15 Exhibit 126. Do you recognize what State's Exhibit 126 is?

16 A I recognize the house.

17 Q That you went to in November of 2001?

18 A Yes.

19 Q All right. And when you were in that house, did you
20 observe anything or what did you do in the house I guess?

21 A Well, we went in the house. I sat down and
22 observed. There was a leather couch. The house was nice.
23 You know what I'm saying? The house was really nice.

1 Q What kind of couch was it?

2 A Leather black couch.

3 Q All right. I'm going to show you State's Exhibit
4 124 and ask if you recognize State's Exhibit 124?

5 A That's the couch.

6 Q And what did you do on that couch?

7 A She gave me a blow job on that couch.

8 Q All right. And I'm gonna show you now State's
9 Exhibit 104 and ask if you recognize State's Exhibit 104?

10 A We took it to the room, that room right there, and
11 she wanted me to have sex with her and I told her no.

12 Q All right. Why did you tell her you didn't want to
13 have -- she wanted to have vaginal sex with you?

14 A Intercourse. She wanted me to stick it in.

15 Q Was this before or after she had given you oral sex?

16 A This was out there on the couch, she gave me oral
17 sex and then we worked our way back to the room.

18 Q What did you distinctly remember about the room?

19 A All them jerseys.

20 Q Why did that catch your eyes?

21 A Because I love jerseys myself. You know what I'm
22 saying?

23 Q And did you ask her anything?

1 A Yeah. I asked her could I get one. They was all
2 too small for me because they was all mediums and smalls and
3 large. I wear like a 3X so they was all too small for me.

4 And she told me --

5 Q You're a rather large individual?

6 A Yeah.

7 Q What's your height and weight?

8 A 6'1", 240.

9 Q Is that about the same height and weight you were --

10 A Back then, I was weighin' a little bit more then. I
11 was weighin' like 250 then. I lost a little weight.

12 Q And I'm gonna show you State's Exhibit 249 and ask
13 if you recognize State's Exhibit 249?

14 A Yes. I remember that.

15 Q What is State's Exhibit 249?

16 A The plants, the background of brass and the glass
17 back-there in the background.

18 Q And was that in that residence?

19 A Yes. That's at that residence.

20 Q And do you recognize the individual there?

21 A Yes.

22 Q And who is it?

23 A Donna Roberts.

1 Q Now, Mr. Mason, do those photographs fairly and
2 accurately depict Donna Roberts in the residence at 254
3 Fonderlac?

4 A That's what I seen in the house when I was there,
5 yes.

6 Q Now, after you refused to have intercourse with her,
7 what happened?

8 A She got attitude.

9 Q What do you mean when you say she got attitude?

10 A For one thing, she come up to my job. First, she
11 called.

12 Q Well, right, right that day. What happened?

13 A That day, she got mad and she wanted me to walk
14 home, but she gave me a ride back to Greyhound.

15 Q Did she say anything to you about you refusing to
16 have intercourse with her?

17 A She just balled her face up, got attitude and, "Come
18 on, I'm taking you back where you came from," or whatever and
19 dropped me off.

20 Q Where did she take you?

21 A She dropped me right back off at Greyhound.

22 Q Here in Warren?

23 A Yeah. Here in Warren.

1 Q Now, a few days later, did you have a chance to see
2 Donna Roberts again?

3 A Yes. We talked.

4 Q And tell this jury how you came to see Donna Roberts
5 again.

6 A She had called up to my job.

7 Q And where were you working?

8 A I was workin' at Vista Windows at this time up on
9 Elm.

10 Q Up on Elm Road?

11 A Elm Road, yes. It's right behind Perkins.

12 Q And what did she do when she came to see you?

13 A Well, I thought she was coming up there to take me
14 out to lunch. Then I pulled up from Wendy's. She's standing
15 outside with her cell phone callin' me all kind of black MFs
16 and, "Mother Fucker, you took my gun. Why in the fuck you
17 take my money?" And this and that and all this.

18 And I'm looking at her like she crazy. Like what
19 the hell is you talkin' about? I said, "You must deal with
20 too many black guys. You can't point the finger at me
21 because you deal with too many of 'em."

22 And she was like, "I know you done it. I'm gonna
23 have the police come up here and arrest you for stealing my

1 gun and stealing my money," and some kind of phone calls and
2 crap. Trying to just claim all kind of craps on me. So
3 after that, she left.

4 Before she left, my boss came outside and told her,
5 asked her what she was waiting on. And she said, "I'm
6 waiting on Howland Police," and he said, "Good. Because they
7 can come and take you to jail, too, for being on private
8 property."

9 So that's when she left. The next day, I go to
10 work, Howland Police come up there again and ask me to come
11 up to the police station for questioning.

12 Q Right.

13 A So I go up there, they put me in the room and record
14 me or whatever, ask me questions about the last time I seen
15 her and did I know anything about a gun and all this and
16 that. I'm telling 'em no. So next thing I know, they tell
17 me I have a warrant out for my arrest. I'm like, "For what?"

18 "For a stolen gun."

19 I'm like, "How could you put a warrant out for
20 somebody's arrest and I ain't done anything?"

21 They say, "Well, this is the law," or whatever.
22 "You going to jail. You going down to the county."

23 So they took me down to the county. I was down

1 there for like two or three days. I lost my job behind that.

2 Q You lost your job because you were incarcerated for
3 those two or three days?

4 A Yes. Because, first, my boss was gonna get me out,
5 but they couldn't get me out because I had a speeding ticket
6 too. See what I'm sayin'? So they were holding me down for
7 that. So that's another reason they probably hold me a
8 couple of days, too, because I had a speeding ticket.

9 But other than that, they hold me in there and I
10 finally got out. I think it was on a Tuesday I got out of
11 jail. And as soon as I done that, I got me an attorney. But
12 at the time, I was still talking to Detective Hoolihan and
13 another detective. I forgot his name. I just seen the
14 fellow here. He was here today.

15 Q So eventually what happened with this accusation
16 that you stole Miss Roberts' gun?

17 A Yeah. She said I pulled her gun. I went to work.
18 Then at the time, I remember right before I got fired from my
19 job, I went to work, they was like detectives came back up
20 there again and told me that I had to come up there and take
21 care of, go to the police station and talk to some more
22 police officers and everything.

23 Q Were you ever convicted of that crime, of stealing

1 her gun?

2 A No, I was not convicted.

3 Q Now, Mr. Mason, the individual that you've described
4 as Donna Roberts, is she here in this courtroom?

5 A Yes, she is.

6 Q Can you please identify or point to her?

7 A She right there (indicating.)

8 MR. BECKER: Please allow the record to
9 reflect that the witness has identified Donna Roberts.

10 THE COURT: The record will so reflect.

11 MR. BECKER: Give me one moment, Your
12 Honor.

13 THE COURT: Sir, do you mind being
14 photographed while you're on the stand? You have the right
15 not to be photographed. If you don't mind, then that's okay.

16 THE WITNESS: I don't want to be
17 photographed. I don't want to be in the newspaper, anything.

18 THE COURT: I'm sorry?

19 THE WITNESS: I do not want to be
20 photographed because I don't want to be in the newspaper, my
21 picture.

22 THE COURT: You do not wish to?

23 THE WITNESS: Huh? Excuse me?

1 MR. INGRAM: He does not.

2 MR. BECKER: I have nothing further, Your
3 Honor.

4 CROSS EXAMINATION

5 BY MR. INGRAM:

6 Q Afternoon, Mr. Mason. How are you?

7 A How's it going?

8 Q You first meet Donna Roberts back in the fall of
9 2001 at the Greyhound bus station?

10 A It was like in November, yes.

11 Q And you're using public transportation at that time;
12 am I correct?

13 A Yes, sir.

14 Q And that's because your license was suspended?

15 A Yes, sir.

16 Q Was your license suspended as a result of a failure
17 to pay a fine?

18 A Yes, sir. I wasn't working at that time. I was on
19 my way payin' that fine and I thought because I was
20 incarcerated that it would be gettin' taken care of, but it
21 didn't.

22 Q Okay. But your license was suspended because you
23 had not paid a fine?

1 A Yes.

2 Q And you go to the Greyhound bus station to purchase
3 a ticket to go to Cleveland?

4 A Yes.

5 Q To see your family?

6 A Yes.

7 Q And she strikes up a conversation with you?

8 A No. I strikes up a conversation with her.

9 Q Well --

10 A Because I noticed the picture. And she was writing.
11 I noticed the picture and I said, "Oh, he must be in
12 Belmont."

13 She didn't strike it with me. I struck it up with
14 her.

15 Q Okay. Well, at some point that day, did she tell
16 you that you were so cute?

17 A No. She -- yeah. She said that. I wouldn't --

18 Q Did she tell you that you were so cute?

19 A Yeah. She said I was cute, yeah.

20 Q And that's about the same time you see this
21 photograph?

22 A No. She says I was cute afterwards, before -- after
23 all that.

1 Q Okay. Well, when you look at this photograph, you
2 recognize the background of the photograph as the Belmont
3 Correctional Facility?

4 A Yeah.

5 Q Well, Belmont, were you in the Belmont Correctional
6 Facility?

7 A Yes, I was.

8 Q And Belmont only takes felons; am I correct?

9 A Yes, they do.

10 Q So how many felonies you been convicted of in the
11 last ten years?

12 A Oh, in the last ten years of my life, I've been
13 locked up three times. I have three numbers.

14 Q Okay. What felonies have you pled to or been
15 convicted of?

16 A Well, I've been convicted of when I seen my parole
17 officer back in '99.

18 Q Is that the escape charge?

19 A Yes.

20 Q You were on parole for another felony?

21 A No.

22 Q You were on parole for a misdemeanor?

23 A That's not a misdemeanor. That's a felony because

1 I --

2 Q Escape?

3 A Escape. That's a felony.

4 Q I you thought you got charged with escape for
5 failure to report to your parole officer?

6 A That's the same thing, sir.

7 Q So you have two escapes?

8 A One escape.

9 Q What got you put on parole the first time?

10 A Back in the day, I was living in Cleveland. I was
11 hangin' around the wrong crowd. I was selling drugs.

12 Q You were selling drugs?

13 A Yes, I was.

14 Q What kind of drugs were you selling?

15 A I was selling crack cocaine.

16 Q And is that what got you sent to Belmont the first
17 time?

18 A No. The first time I got locked up was in Grafton.
19 It was in Grafton, Lorain. I was real young.

20 Q And what got you, you had to be 18 or you don't go
21 to Grafton; right?

22 A Yeah. I was like 25, 24.

23 Q What got you sent to Grafton that time?

1 A My very first time, I was selling drugs. That was
2 my first time.

3 Q The second time was selling drugs?

4 A The second time was aggravated assault.

5 Q And then the third time?

6 A The third time was failing to see my parole officer.

7 Q So while you and Donna are in the Greyhound bus
8 station, she's writing a letter to Nate; is that right?

9 A I guess so. That's what she was writin'. She had
10 his picture beside the letter.

11 Q So at the same time she's writing the letter to
12 Nate, she's fixin' up a date with you for 5:00 that day when
13 work is over?

14 A Yes, sir. Not that day because I was going to
15 Cleveland that day. When I got back from Cleveland, we set
16 up that thing. When I got back, we set up an appointment
17 where we were gonna hook up. When I got back, she was there,
18 and that's when we started hookin' up with each other.

19 Q Was that the same day or a different day?

20 A A different day.

21 Q How many days later?

22 A About two days.

23 Q And is that the occasion that she takes you to her

1 home?

2 A Yeah, she do. We rode around for a minute before
3 she took me there because she smoked a fat joint, a couple of
4 fat joints, and then she rode to her house.

5 Q And while you are with her, she tells you that her
6 boyfriend is Nate Jackson; right?

7 A She asked me did I know him because I was in
8 Belmont. I told her no. I asked her his name. She told me
9 his name. I told her I didn't know him.

10 Q She told you his name?

11 A She asked -- yeah. She told me his name because she
12 asked me did I know him. I told her I didn't know him.
13 Because I was down there. I wasn't trying to associate with
14 a lot of people down there.

15 Q Did she indicate to you that that was her boyfriend?

16 A Yes, she did. She said that was her little lover on
17 the side. And I asked her was she married. And she's like,
18 "Yeah."

19 I said, "What you doing with a boyfriend on the
20 side?" Flat out. Like that.

21 She's like, "Well, my husband don't take, don't
22 satisfy my needs."

23 Q Did she tell you she was separated?

1 A Yeah. Something like that.

2 Q That her and her husband had separate bedrooms?

3 A Yeah.

4 Q So while she's telling you that she had separate
5 bedrooms with her husband and she loves Nate Jackson, she's
6 performing fellatio on you on the couch?

7 A I guess I remind her of Nate. That's what it was.
8 You know what I'm saying? I think we favored or whatever in
9 certain ways and that's why, that's what made her really like
10 me because I guess I reminded her of him a little bit.

11 Q Well, would you agree that regardless of her
12 feelings about Nate, whatever those feelings were, they
13 weren't strong enough to stop her from throwing herself right
14 at your feet?

15 A True.

16 Q Isn't that what you're telling us? She wanted to
17 have sex with you?

18 A Exactly. As soon as I came back, she wanted me.

19 Q Now, you owed a fine at this time; right?

20 A Yeah. I owed a fine.

21 Q Of \$238 or thereabouts?

22 A No. It was \$280 to be exact. It was in east
23 Cleveland.

1 Q \$280?

2 A Yes.

3 Q Did you have to pay that \$280 in order to get your
4 license reinstated?

5 A I paid, I went down to east Cleveland and made a
6 payment plan with them and they dropped the charges because
7 they found out I was in Belmont so they dropped the charges.

8 Q Did you borrow the money from Donna to pay that
9 fine?

10 A I didn't get no money from Donna.

11 Q Did you borrow \$238 from Donna?

12 A I didn't borrow no money from Donna.

13 Q Do you recall talking, giving a tape-recorded
14 statement to Detective Hoolihan from the Warren Police
15 Department and Detective Dillon, this gentleman right here?

16 A Uh-huh.

17 Q On December 13th of 2001?

18 A Yes. I remember talking to them guys.

19 Q And you're telling us under oath that you never told
20 them you borrowed \$238 from Donna Roberts?

21 A She wanted to give me some money for having some sex
22 with her. That was all it was about. It wasn't about me
23 borrowing no money. She really told me, "If you need any

1 money, I will help you out."

2 That's what this lady told me.

3 Q So your position is it wasn't a loan, it was payment
4 for services rendered?

5 A Yeah. She didn't tell me it was no loan because I
6 didn't ask her for nothing. She told me, "I will help you
7 out," because I was talking about my fines. That's why I was
8 taking Greyhound.

9 Q You were telling her about your fines? Did she give
10 you money?

11 A She offered to give me some money. It wasn't no --

12 Q Did you tell them that she, in fact, gave you \$238?

13 A She gave me a hundred and like 80 bucks.

14 Q Do you want me to play the tape where you talk about
15 238?

16 A You can play the tape. It might refresh my memory.

17 MR. INGRAM: Did you guys bring that tape
18 with you?

19 MR. BECKER: Yeah. It's right here.

20 MR. INGRAM: Get it out. I want to use
21 it.

22 MR. BECKER: You have a copy of it, right,
23 or do you want the tape? Oh, we got it. We got it.

1 Q (By Mr. Ingram) Did you use that money to pay your
2 fine?

3 A Yes, I did. Like I say, I went down there to get me
4 a payment plan.

5 Q She ask you to do anything in return for that money?

6 A She wanted me to have sex with her flat out and I
7 wouldn't have sex. She had oral sex on me and she got mad
8 because I wouldn't have sex with her.

9 Q Well, she never asked to you kill her husband, did
10 she?

11 A No way.

12 Q As a matter of fact, she never said anything to you
13 bad about her husband at all, did she?

14 A No way.

15 Q She told you when she gave you the money that money
16 meant nothing to her, didn't she?

17 A She said that money ain't nothin' to her. She had
18 plenty of money. That's what she said. Money don't mean
19 nothin' to her.

20 Q She also told you all the property was in her name?

21 A Yes, she did.

22 Q She ever take you for a haircut?

23 A No, she didn't. The haircut place is right next

1 door to the Greyhound. I just go there and get my hair cut
2 at Final Cut. I still go there to this day.

3 Q Now, you have, as you and I are talking, you filed a
4 lawsuit against Donna for money damages, haven't you?

5 A Yes. I lost my job behind that. I was up under
6 stress because I thought I was gonna get accused for
7 something I didn't do because people do get locked up for
8 something they didn't do lots of time.

9 Q Let's talk for a second because there are actually
10 some ground rules here. If you can answer, fairly and
11 reasonably answer my questions yes or no, you should. The
12 question was have you filed a lawsuit for money damages?

13 A Yes.

14 Q And is that gentleman sitting back there in the blue
15 shirt your lawyer?

16 A Yes, he is.

17 Q That's Mr. Bluedorn. And that lawsuit asks for
18 money damages for some amount in excess of \$25,000?

19 A Yes.

20 Q And how much money do you hope to get?

21 A I don't know how much money I hope to get. I'm
22 letting my lawyer take care of that.

23 Q But you're just hoping it's some sum over \$25,000?

1 A This procedure made me lose my job. I lost my job
2 behind it. It put me in a bad character.

3 Q It's a fact, is it not, that your lawsuit is based
4 on a theory that Donna tried to frame you, that Donna Roberts
5 instigated, instituted and perpetuated the criminal
6 proceedings against you in order to frame you for the murder
7 of Robert Fingerhut?

8 A True.

9 Q Did you come up with that theory on your own or did
10 the police help?

11 A No. I came up with that. After the police told me
12 what was going on, after Detective Dillon and Hoolihan told
13 me what was going on, that she was trying to say I stole her
14 gun and point the finger at me so her and Nate, Mr. Jackson,
15 go in the clear, that's what made me come up with that
16 theory.

17 Q Okay. They gave you the facts and then you put them
18 together to come up with that theory; is that right?

19 A That's all I can think of.

20 Q When were you arrested on this complaint?

21 A Excuse me?

22 Q You were arrested on the complaint Donna filed
23 against you?

1 A Yeah. She put a warrant out for my arrest.

2 Q You were arrested on December 3d?

3 A Yes.

4 Q And as I understand your answers to Mr. Becker, you
5 were unable to make bail so you spent two or three days in
6 jail?

7 A Yes, I did.

8 Q Money's tight; right?

9 A Yeah.

10 Q Hard to come up with money?

11 A Yeah, when you ain't working at the time. I had
12 that money from my mother-in-law. She had got me out the
13 third day.

14 Q You weren't working when you were arrested?

15 A Yes, I was working.

16 Q Okay. So even though you were working, money was
17 tight?

18 A Because that wasn't my pay week.

19 Q Oh. Well, I guess Donna is lucky that you posted
20 bail, isn't she?

21 A Why you say that?

22 Q Well, you're telling us she tried to set you up as a
23 patsy; right?

1 A That's how I feel.

2 Q If you hadn't posted bail, you would have been in
3 jail on December 11th; am I right?

4 A If I hadn't posted bail, I probably would have sat
5 there until I went to court again.

6 Q You were arrested on December 3d; correct?

7 A I don't know practically what time I was arrested,
8 but --

9 Q Well, here. Take a gander at your lawsuit, young
10 man, and you tell me if you allege that you were arrested on
11 December 3d. I'm sorry. I have a copy of that for the
12 prosecuting attorney. Excuse me one minute.

13 A Excuse me. My lawyer have all the copies and
14 everything what day I was arrested and everything. I don't
15 remember everything.

16 Q Here's certified records from Youngstown Municipal
17 Court. You're arrested on December 3d. You want to argue
18 about that date or do you want to concede that date?

19 A I don't want to argue about no date because I know I
20 was arrested. I don't know what exact day I was arrested,
21 but like I said, my lawyer have copies and everything when I
22 was arrested and everything.

23 Q I don't care what your lawyer has copies of. You're

1 telling this jury she tried to set you up for a patsy when,
2 in fact, she had you arrested on December 3d; correct?

3 A Yeah. She did try to set me up for it.

4 Q And she knows you don't have money, doesn't she,
5 because you couldn't pay your fine to get your license
6 reinstated?

7 A No, I could have paid my fines, but I was working at
8 the time. I have other bills. I'm a family man.

9 Q You couldn't pay your fine. Why didn't you pay?

10 A Because I have bills down here. I have a family
11 down here.

12 Q So if you can't come up with money after you're
13 arrested, you stay in jail; correct?

14 A I guess so, but I came up, my mother-in-law got me
15 out.

16 Q Well, is she telepathic? Is she gonna know your
17 mother-in-law is gonna get you out?

18 A I don't know what she know, but I know I called my
19 peoples and they got me out.

20 Q Now when you were questioned by the police on
21 December 13th of 2001, that's Detective Dillon and Detective
22 Hoolihan, you actually go, where, to the Howland Police
23 Department; right?

1 A Excuse me? Say that again.

2 Q Did you go to the Howland Police Department and they
3 questioned you?

4 A Yes, I did.

5 Q And they question you about your whereabouts on
6 December 11th; correct?

7 A Yes, they did.

8 Q And you're married?

9 A Yes, I am.

10 Q And you have kids?

11 A I have kids. I have one son in Cleveland and I have
12 a daughter down here in Warren.

13 Q Does the girl you have down here in Warren, does she
14 live with you and your wife?

15 A Yes.

16 Q And back at this time, you were working Monday
17 through Friday from about 9 to 2?

18 A 9 to 3.

19 Q 9 to 3?

20 A Yes.

21 Q And when they were talking with you, they asked you
22 about your whereabouts on December 11th; do you recall that?

23 A I told 'em I was at the Fiesta. I like to shoot

1 pool a lot.

2 Q What?

3 A I like to shoot pool a lot so I was at the Fiesta
4 shootin' pool.

5 Q Up until about 10:00; right?

6 A About 10:30, 10:00. Go to the house, go to bed,
7 ready to go to work the next day.

8 Q Okay. So when the police asked you where you were
9 at midnight on Tuesday, December 11th, you say that, "I was
10 at home and in bed with my wife"?

11 A Oh, yeah. At that time, I was in bed at the time.

12 Q And as a matter of fact, if I asked you where you
13 were on any given Tuesday when you were working, your answer,
14 at midnight, your answer would be, "At home in bed with my
15 wife;" correct?

16 A Yeah. Because I had to go to work in the morning,
17 true.

18 Q Right. How many Tuesdays would we have to go back
19 in time before your answer would be different?

20 A I don't know how many Tuesdays. I do something
21 different almost every day.

22 Q But you go to work every morning; right?

23 A Exactly.

1 Q So you go to bed at a reasonable hour?

2 A I go to bed no later than 10:30, 11:00.

3 MR. INGRAM: Can I have a moment, Your
4 Honor?

5 THE COURT: Yes.

6 Q (By Mr. Ingram) When Donna presented herself at
7 your place of employment, that didn't make you a happy
8 camper, did it?

9 A No, it didn't. At first, I was happy to see her
10 until she started sticking me with her phone like she wanted
11 to shoot me like, "Mother fucker, you took my gun," and all
12 this and that.

13 I'm like, "What is you talkin' about?"

14 Q And eventually you learned that she had sworn out a
15 warrant for your arrest?

16 A Yeah. Later on that, later on that, later on the
17 next day when the detectives come up there.

18 Q And right around that same time, you placed a
19 telephone call to Robert Fingerhut, did you not?

20 A Oh, yeah. I called her husband at the Greyhound
21 station and told him that she was threatenin' me and talking
22 about some gun or whatever and talkin' about I took some
23 money or whatever. Yes, I did call her husband, but I didn't

1 get --

2 Q And you also told her husband that, "Donna is
3 cheating on you"?

4 A Oh, I didn't tell her husband nothing like that.

5 MR. INGRAM: Okay. Your Honor, could we
6 have a recess so I can get this tape set up?

7 THE COURT: Yes. How much time do you
8 need?

9 MR. INGRAM: Probably five, ten minutes.

10 THE COURT: Let's take ten minutes. You
11 are not to discuss anything about the case until you return.
12 You are not to form an opinion.

13 (Whereupon, a recess was had commencing at 3:17 p.m. and
14 concluding at 3:35 p.m.)

15 THE COURT: Mr. Ingram.

16 MR. INGRAM: Thank you, Your Honor.

17 Q (By Mr. Ingram) Mr. Mason, do you recall having a
18 conversation with Detective Hoolihan and Detective Dillon
19 back on December 13th, 2001 at approximately 2:35 in the
20 afternoon?

21 A Yes.

22 Q I'm gonna play for you and hopefully the microphone
23 will pick it up so that the jury can hear a portion of your

1 conversation with those detectives on that date.

2 (Whereupon, counsel played a portion of an audio tape for the
3 witness.)

4 Q (By Mr. Ingram) I asked you previously if you had
5 told Mr. Fingerhut that Donna was cheating on him and you
6 said no.

7 A Well, that would have been around --

8 Q Sir, sir, answer my question, please. Did that tape
9 refresh your recollection?

10 A Yes. Yes, it does.

11 Q Did you tell Mr. Fingerhut that Donna was cheating
12 on him?

13 A Yeah. It was on the recording. I must have said
14 something. I was mad at the time.

15 Q So when you said no, that was an incorrect answer
16 under oath?

17 A I didn't remember all that. You know what I'm
18 sayin'?

19 Q You didn't remember all that?

20 A I was so mad that day.

21 Q You didn't say you didn't remember what you said to
22 Mr. Fingerhut, did you? You said you had not told him that
23 Donna was cheating on him?

1 A Like I said, I told him, I talked to him on the
2 phone. I don't remember the conversation I said because I
3 was mad at the time because she came into my job and kept on
4 harassing me.

5 Q Okay. So now -- let's be clear about this. Now you
6 remember calling him and telling him that Donna was cheating
7 on him?

8 A Yeah.

9 Q And you told the police that you made that telephone
10 call to Mr. Fingerhut about a month before the interview. So
11 the interview was on December 13th. And if it's a month
12 before, that's about the middle of November; is that right?

13 A I guess so. I don't remember. I can't remember
14 that far back. That's like a year ago.

15 Q You remembered far back when you were talking to the
16 gentlemen from the prosecution here.

17 A I remember the discussions I had with the
18 detectives, but I don't know the exact words I was saying
19 then because I was mad at the time when I was talking to them
20 telling them about the situations that happened at my job.

21 Q Do you have a selective recollection?

22 A What?

23 Q Do you have, can you only remember what you want to

1 remember?

2 A Ain't about what I want to remember. I just knew I
3 was pissed off at the time and I was just, just telling the
4 detectives what was on my mind right when I had done.

5 Q Okay. You were pissed off so you called
6 Mr. Fingerhut to tell Mr. Fingerhut that Donna was cheating
7 on him?

8 A True. It was on the recorder. Yeah. I must have
9 started that.

10 Q Well, if we had never got this recording, would you
11 have ever told us the truth?

12 A It ain't about me telling the truth.

13 Q It's not about you telling the truth? Did you take
14 an oath?

15 A Excuse me?

16 Q Did you take an oath to tell the truth?

17 A Yes, I did, but I couldn't remember.

18 Q Let me tell you something, sir. While you are here,
19 everything is about you telling the truth.

20 A I am telling the truth about everything, but I
21 couldn't remember everything.

22 Q And when you said you had not called Mr. Fingerhut,
23 that simply was not the truth?

1 A I said I called Mr. Fingerhut, but I couldn't recall
2 all the words, all the conversations that we had though. I
3 did say I called him.

4 Q You said you called him, but you said you had not
5 said anything about Donna cheating. That was not the truth,
6 was it?

7 A It's the truth. It's on the recorder. The tape is
8 the truth.

9 Q We now know it's the truth. The question is, your
10 previous testimony under oath was not the truth?

11 A Well, it's the truth. I know I didn't steal no gun.
12 I didn't murder nobody.

13 Q I agree with that. You want to go back and talk
14 about the \$220?

15 A You can record, we can go rewind that and go back
16 and talk about it.

17 Q Well, do we have to?

18 A You don't have to.

19 Q She gave you \$220, didn't she?

20 A She gave me some money.

21 Q About \$220?

22 A I would say about \$180. It was about \$180.

23 MR. INGRAM: I have no further questions.

1 THE COURT: Any redirect?

2 REDIRECT EXAMINATION

3 BY MR. BECKER:

4 Q Mr. Mason, who took Donna Roberts' gun?

5 A I don't know.

6 Q Did you take Donna Roberts' gun?

7 A I didn't take no gun.

8 Q And when were you accused of taking Donna Roberts'
9 gun? When were you accused of doing it? Approximately.

10 A (No response.)

11 Q Well, let me withdraw that question.

12 Let me ask you this. How long after you rebuffed
13 her sexual advances to you were you accused of taking her
14 gun?

15 A I can't remember. I think it was about three to
16 four days afterwards. Somethin' like that.

17 Q And who was responsible for you being charged for
18 taking a firearm in December of 2001?

19 A She was responsible for saying I took her gun.

20 MR. BECKER: I have nothing further.

21 RECROSS EXAMINATION

22 BY MR. INGRAM:

23 Q Donna Roberts is responsible for getting you thrown

1 in jail on December 3d, 2001?

2 A Yes, because she put a warrant out for my arrest
3 that I stole a gun from her.

4 Q I'm gonna ask you this question again. Try to
5 answer my question. She's responsible for getting you thrown
6 in jail on December 3d, 2001. Yes or no?

7 A The day I went to jail, she's responsible. Yes, she
8 is responsible for that.

9 Q And you went to jail before December 11th, 2001,
10 didn't you?

11 A Yeah, I went to jail before -- you say the 11th?
12 Like I say, I can't remember the exact day or whatever
13 because it's been almost a year ago, but --

14 Q Well, you wouldn't file a false or frivolous
15 lawsuit, would you?

16 A Yes, I filed a lawsuit.

17 Q Yes, you would?

18 A Yes, I filed a lawsuit.

19 Q I didn't ask you if you filed one. I said you
20 wouldn't file a false and frivolous one. That's a false one.

21 A No, I didn't file no false --

22 Q Read to the jury paragraph five.

23 A Which one?

1 Q Paragraph five.

2 A "On or about December 3d, 2001, the Warren Police
3 arrested plaintiff, Santiago Mason, pursuant to warrant
4 issued upon defense. The plaintiff was taken to and confined
5 in the Trumbull County Jail for two days before release on
6 bond answering to the charges before Warren Municipal Court."

7 Q The truth is, you're arrested on December 3d;
8 correct?

9 A The truth is, I don't know exactly what day I was
10 arrested, but I know I was put in jail.

11 Q If your lawyer said it was December 3d, are you
12 gonna tell him he's wrong?

13 A If my lawyer got the paper that show me the day I
14 was in jail, it's right. If it's on this paper, it's right
15 then.

16 Q Okay. It says December 3d. So it's right?

17 A Yeah.

18 Q And that's before December 11th, isn't it?

19 A Exactly.

20 MR. INGRAM: No further questions.

21 THE COURT: Redirect?

22 * * *

23

FURTHER REDIRECT EXAMINATION

BY MR. BECKER:

Q Mr. Mason, have you ever heard of a typographical error?

A No.

Q All right. Do you think that sometimes people put the wrong dates in documents?

A Mistakes can happens.

Q Okay. Could you have been arrested on December 13th rather than December 3d?

A Like I said, I don't know what day I got arrested on because I don't remember.

Q So we need to check the Trumbull County records --

A Yes.

Q -- to see when exactly you were arrested in December?

A Yes.

Q Whether it was before December 11th or after December 11th?

A Yes.

Q Correct?

A Because I don't know exactly what day. I know I was in jail. That's all I know. I went to jail for something I

1 didn't do.

2 Q And you don't know the exact date, even regardless
3 of what it says in that lawsuit?

4 A Exactly.

5 Q That may be, someone may have forgot to put the one
6 in before the three?

7 A I don't know.

8 MR. BECKER: I have nothing further.

9 MR. INGRAM: Chris, where is that, those
10 certified records?

11 MR. BECKER: Right there.

12 FURTHER RECROSS EXAMINATION

13 BY MR. INGRAM:

14 Q Regardless of whether your lawyer made a
15 typographical error, she comes to your place of employment
16 with the cell phone and calls the police well before December
17 11th; correct?

18 A I don't know the exact date it was, but I know she
19 came to my job.

20 Q Well, it was the same day that you told the police
21 you called Mr. Fingerhut; is that correct?

22 A Like I said, I don't know the exact date that I
23 called and what exact date that I went to jail, but I know I

1 was jail and I know I called her husband. I'm not
2 remembering, I don't remember dates. I know it was cold
3 outside.

4 Q When Dillon here and Hoolihan came to talk to you,
5 were you home or were you in jail?

6 A I was at work when they came and talked to me.

7 Q Did they come to talk to you on December 13th, 2001?

8 A I don't recall. I can't remember what date it was,
9 sir.

10 Q Okay.

11 A I just know that they came up to my job and told me
12 to come up to Howland Police station.

13 MR. INGRAM: Your Honor, I know I'm gonna
14 aggravate, sorry Ladies and Gentlemen, I'm gonna try the
15 jury's patience. I have to rewind this for a second.

16 MR. BECKER: I'm sorry?

17 MR. INGRAM: I'm rewinding.

18 THE COURT: Is there a transcript of that
19 tape?

20 MR. INGRAM: I don't have one.

21 MR. BECKER: No. There is no transcript
22 of that tape.

23 MR. INGRAM: I guess it would be real

1 simple if Detective Dillon could tell us what day the
2 interview took place.

3 MR. BECKER: Do you want to call him for
4 limited purposes?

5 MR. INGRAM: Yes.

6 DETECTIVE FRANK DILLON: The 13th.

7 MR. BECKER: Okay. Are you done with
8 Mr. Mason?

9 MR. INGRAM: Yes.

10 THE WITNESS: You done with me?

11 THE COURT: You're excused then. Thank
12 you very much.

13 DEPUTY GARY BACON: Is he excused or just
14 temporarily?

15 MR. INGRAM: Temporarily. I may have more
16 questions.

17 MR. BECKER: Just wait in the hallway.

18 THE WITNESS: All right.

19 MR. BECKER: Your Honor, I guess that the
20 defense has requested that Detective Sergeant Dillon be
21 called for the limited purpose, and we have no objection to
22 him being taken out of order, for the limited purpose of --

23 MR. INGRAM: Establishing the date of the

1 interview.

2 MR. BECKER: -- the day that Mr. Mason was
3 arrested.

4 THE COURT: This should be pretty easy to
5 clear up as to whether it was the 3d or the 13th.

6 WHEREUPON,

7 FRANK DILLON,
8 having been first duly sworn, according to law, was examined
9 and testified as follows:

10 CROSS EXAMINATION

11 BY MR. INGRAM:

12 Q When did the Mason interview take place?

13 THE COURT: Okay. Let me stop you just
14 one minute. This is for purposes of cross examination at
15 this point.

16 MR. BECKER: I don't -- yeah.

17 MR. INGRAM: It doesn't matter.

18 MR. BECKER: We have no objection to
19 Mr. Ingram leading off the questioning of this witness at
20 this time.

21 THE COURT: Okay. Fair enough. Go ahead.

22 A According to my report --

23 MR. INGRAM: I'll withdraw that.

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1 easier to get through, and I suspect it makes for a
2 more just result, also.

3 Everybody has had their say and I hope
4 have been afforded a fair trial. This will be
5 reset for sentencing once the Court has reviewed
6 the matter. I thank you all very much.

7 (Court adjourned at 4:25 p.m.)
8
9
10

11 Friday, June 20, 2003; In Open Court at 1:50 p.m.:
12 Sentencing Hearing before Judge Stuard:

13 THE COURT: On May 28, 2003, a
14 Trumbull County Petit Jury returned a unanimous
15 verdict finding the Defendant, Donna Marie Roberts,
16 guilty of two counts of complicity to commit
17 aggravated murder, arising from the death of Robert
18 S. Fingerhut. Each count contained two
19 specifications of aggravating circumstances, listed
20 in division A of section 2929.04 of the Revised
21 Code.

22 Since Counts One and Two of the

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1 indictment merge for sentencing purposes, the State
2 elected to dismiss Count Two and the specifications
3 thereto prior to the commencement of the mitigation
4 phase. Therefore, for purposes of this opinion,
5 the Defendant was convicted of the first count of
6 the indictment or purposely and with prior
7 calculation and design, causing the death of Robert
8 S. Fingerhut.

9 On June 4, 2003, the mitigation or second
10 phase of the trial began. The Jury in that phase,
11 unanimously found that the State had proven beyond
12 a reasonable doubt, that the aggravating
13 circumstances, to-wit, Specification One to Count
14 One, that the Defendant was a complicitor in
15 committing or attempting to commit or in fleeing
16 immediately after committing, or attempting to
17 commit aggravated burglary, and that the Defendant
18 committed the aggravated murder with prior
19 calculation and design. And Specification Two to
20 Count One, that the Defendant was a complicitor in
21 committing or attempting to commit or in fleeing
22 immediately after committing or attempting to

1 commit aggravated robbery. And that the Defendant
2 committed the Aggravated Murder with prior
3 calculation and design outweighed the mitigating
4 factors, and returned two verdicts recommending the
5 death sentence.

6 Pursuant to Revised Code, Section
7 2929.04(F), the Court is now obligated to file a
8 separate written opinion independently weighing the
9 aggravating circumstances of each specification
10 against the mitigating factors. The weighing
11 process reflected in this opinion is based upon
12 evidence heard by the Jury, but is done
13 independently and without regard to the findings of
14 the Jury.

15 Factually, the evidence at trial revealed
16 that the Defendant planned the murder of her
17 ex-husband and housemate, Robert S. Fingerhut, for
18 \$550,000 in insurance proceeds. The Defendant
19 plotted the murder for at least three months prior
20 to December 11, 2001. The Defendant corresponded
21 with her convict lover and codefendant, Nathaniel
22 Jackson while he was in prison at the Lorain

1 Correctional Institution.

2 She also accepted 19 collect telephone
3 calls from Jackson while he was incarcerated,
4 wherein they planned the details of the murder.
5 The telephone calls were recorded, and the letters
6 and phone calls were seized by police during the
7 course of the murder investigation.

8 The murder plot included a plan whereby
9 the Defendant would pick up Jackson from prison on
10 December 9, 2001, and take him to the Wagon Wheel
11 Motel in Boardman, Ohio, and rent a room with a
12 mirrored ceiling and Jacuzzi tub where they would
13 have sexual relations. The Defendant would obtain
14 handcuffs, a firearm, ski mask, leather gloves to
15 conceal fingerprints and would ensure Jackson
16 access to the Defendant's residence so that Jackson
17 could abduct the victim and take him out of the
18 house and kill him. The conspirators discussed
19 forcing the victim to watch the Defendant perform
20 oral sex on Jackson before executing the victim.

21 The Defendant planned to set up an alibi
22 at the time of the murder by driving around and

1 going to various retail outlets and shopping, where
2 she would be filmed by the store's video security
3 cameras, and the Defendant made several telephone
4 calls to Fingerhut's place of employment, the
5 Greyhound bus station in Youngstown, Ohio, to
6 ensure that Fingerhut timely left work at
7 approximately 9:00 p.m. on December 11, 2001.

8 The Defendant also provided Jackson with
9 a cellular phone to keep in contact with her while
10 she was driving a red Chrysler 300-M, which
11 contained its own cellular phone.

12 The Defendant had previously checked on
13 the insurance policies, to ensure that they were in
14 effect, and that the premiums were paid until the
15 end of 2001. The Defendant also discussed in the
16 letters and phone calls, obtaining a motel room for
17 Jackson after the killing, so Jackson could hide
18 out after the murder.

19 However, the plan began to go bad when
20 Jackson, who was in Fingerhut's residence,
21 sustained a gunshot wound to his left index finger
22 during a struggle with the victim. Jackson shot

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1 Fingerhut three times including one fatal shot to
2 the head. Jackson left the victim's body in the
3 residence, took Fingerhut's car keys, and
4 Fingerhut's silver Chrysler 300-M from the garage
5 of the residence. Jackson drove Fingerhut's car to
6 Youngstown, Ohio, where he abandoned it
7 approximately three blocks from where he was
8 ultimately arrested on December 20, 2001.

9 A series of telephone calls occurred
10 between the Defendant's telephone and her red
11 Chrysler and her cellular telephone, which was in
12 the possession of Jackson during the time frame of
13 approximately 9:30 p.m. and 12 midnight, on
14 December 11, 2001. Between 9:30 p.m. and 10:30
15 p.m., the Defendant drove Jackson to the Days Inn,
16 in Boardman, Ohio, and rented him a room for one
17 week. Jackson's wound was treated and bandaged in
18 the room.

19 The Defendant returned to the residence
20 in Howland Township, Trumbull County, Ohio and
21 discovered her ex-husband's body just inside the
22 main door leading from the garage. The Defendant

1 called 911, and feigned hysteria. The Defendant in
2 her letters to Jackson, had discussed how she would
3 fake grief upon discovering that her ex-husband had
4 been killed.

5 Howland Township police officers
6 responded to the 911 call, and were met by the
7 Defendant. The police did not find any signs of
8 forced entry, and the only thing missing from the
9 residence were the victim's car keys and the
10 victim's automobile. Two wallets containing a
11 large sum of cash and credit cards as well as other
12 valuables were undisturbed inside the residence.

13 The Defendant told the officers that her
14 husband's car was missing, and granted them
15 permission to search the residence, and her vehicle
16 for evidence that might lead to the killer. And
17 during this search, police found approximately 140
18 letters from Jackson to the Defendant in her
19 dresser. And approximately 140 letters from the
20 Defendant to Jackson, in the trunk of the
21 Defendant's red car, in a paper bag bearing
22 Jackson's name, prison number.

1 As the investigation progressed, the law
2 enforcement officers were able to obtain the 19
3 recorded telephone conversations between the
4 Defendant and Jackson while Jackson was
5 incarcerated in the Lorain Correctional
6 Institution. These tapes constituted approximately
7 three hours of conversation. These telephone calls
8 along with letters which spanned the time frame of
9 approximately three months, revealed a continuing
10 and evolving plan to kill Fingerhut within days
11 after Jackson's release from prison.

12 Jackson was soon arrested at a house on
13 Wirt Street in Youngstown, Ohio, a few blocks from
14 where Fingerhut's vehicle was recovered. And a
15 pair of black leather gloves with fleece lining
16 were recovered from that house at the time of his
17 arrest.

18 In a letter written to Jackson, the
19 Defendant acknowledged that she had found thin,
20 fleece lined leather gloves. The recovered gloves
21 had gunshot residue, and a hole in the left index
22 finger along with the reddish substance, which

1 appeared to be blood in that area. This damaged
2 area matched the injury that Jackson had sustained
3 to his finger.

4 The evidence also revealed that the
5 Defendant, near the approximate time of the murder,
6 was seen driving her automobile in a very slow
7 manner away from the vicinity of the home where
8 Fingerhut lived. Furthermore, within two hours
9 from the last time Fingerhut was seen alive, the
10 Defendant rented a motel room at the Days Inn in
11 Boardman, Ohio for Jackson. In this room, bloody
12 bandages and other medical supplies were found by
13 hotel cleaning personnel and were subsequently
14 collected by the police.

15 Fingerhut's silver Chrysler, which had
16 been stolen by Jackson from the residence was
17 recovered in Youngstown, Ohio. Blood stains in and
18 on the vehicle were collected by law enforcement
19 officers. DNA analysis of the blood stains
20 collected on the trunk latch and the interior sun
21 visor, revealed that the blood matched the DNA
22 profiles of Nate Jackson, and the victim. Blood

1 stains collected from the Days Inn also matched the
2 DNA profile of Nathaniel Jackson.

3 The State also introduced evidence from
4 the letters that the Defendant and Jackson
5 discussed purchasing a new Lincoln or a Cadillac
6 Deville for Jackson. The Defendant and Jackson
7 repeatedly discussed waking up together on
8 Christmas morning. And the Defendant repeatedly
9 stated how much she hated Fingerhut.

10 Additionally, Fingerhut had two life
11 insurance policies with a combined benefit of
12 \$550,000. On December 12, 2001, shortly after
13 calling 911, Howland police officers noted the
14 Defendant's behavior, which included feigned crying
15 and listening in on conversations of investigators.
16 On December 12, 2001, shortly after calling 911,
17 the Defendant told investigators that she had been
18 out shopping at Wal-Mart, Super K-Mart, and Giant
19 Eagle. Police could only confirm that the
20 Defendant was at Wal-Mart at approximately 9:30
21 p.m. The Defendant never stated to police that she
22 had taken Jackson to the Days Inn in Boardman,

1 Ohio.

2 Later in the afternoon of December 12,
3 2001, the Defendant provided police with a list of
4 suspects who may have wanted to kill Fingerhut,
5 including an alleged homosexual lover of the
6 victim. A half Hispanic, half black man that the
7 Defendant had dated, a man named Santiago Mason.
8 And a number of people from the Greyhound bus
9 station. When investigators asked the Defendant
10 about Nathaniel Jackson and the Defendant stated,
11 "Oh, I almost forgot about him." And proceeded to
12 tell the officers that she had last seen Jackson on
13 Monday, December 10, 2001, and had last spoken to
14 him in the morning of Tuesday, December 11, 2001.

15 The investigation revealed that the
16 Defendant and Jackson worked together throughout
17 the afternoon and evening of December 11, 2001.
18 And the State presented evidence and testimony that
19 the Defendant took Jackson to get a haircut, ate
20 dinner with him at Red Lobster and was with him at
21 the Warren Greyhound bus terminal in Warren, Ohio,
22 which was the Defendant's place of employment.

1 One witness, Frank Reynolds, testified
2 that after Jackson's release from prison and prior
3 to the murder, he was present at the Youngstown bus
4 terminal when the Defendant asked Fingerhut for
5 \$3,000. When Fingerhut refused to give her the
6 money, she gave him a dirty look. The Defendant
7 had stated in her letters that she was tired of the
8 grinch doling out the money. And was referring to
9 Fingerhut providing her with a set amount of cash
10 to spend each week. The Defendant planned to
11 obtain a firearm for Jackson and to use it in order
12 to kill Fingerhut.

13 While the Defendant was supposedly in a
14 torrid love relationship with Jackson, she invited
15 the ex-con, Santiago Mason, into her residence
16 where she performed oral sex on him. When he
17 refused her further sexual advances to engage in
18 intercourse, Mason was accused by the Defendant of
19 stealing a .38 caliber firearm. Forensic evidence
20 revealed that the weapon used to kill Fingerhut was
21 consistent with the .38 caliber firearm. The
22 investigation revealed that Roberts was missing two

1 .38 caliber firearms at the time of Fingerhut's
2 murder.

3 In this case, the Jury found the
4 existence beyond a reasonable doubt, of two
5 aggravating circumstances, pursuant to Section
6 2929.04 (A)(7) of the Revised Code, to-wit,
7 Specification One to Count One, that the Defendant
8 was a complicitor in committing or attempting to
9 commit or in fleeing immediately after committing
10 or attempting to commit aggravated burglary, and
11 that the Defendant committed the aggravated murder
12 with prior calculation and design. And
13 Specification Two to Count One, that the Defendant
14 was a complicitor in committing or attempting to
15 commit, or in fleeing immediately after committing
16 or attempting to commit aggravated robbery, and
17 that the Defendant committed the Aggravated Murder
18 with prior calculation and design.

19 With respect to the aggravating
20 circumstances relating to the aggravated burglary,
21 the evidence presented at trial proved that the
22 Defendant allowed Jackson to trespass in

1 Fingerhut's residence, located at 254 Fonderlac
2 Drive, Howland Township, Trumbull County, Ohio,
3 with the specific purpose of killing Fingerhut with
4 prior calculation and design.

5 Jackson was wearing leather gloves and
6 armed with a firearm, which he used to shoot the
7 victim three times causing his death. The gloves
8 and the ski mask, firearm and access to the house
9 were all provided by the Defendant with prior
10 calculation and design, as evidenced by the
11 telephone calls and letters introduced by the
12 State. The Defendant assured the victim's arrival,
13 by checking at his place of employment, and
14 determining when he left work by calling him on the
15 telephone while he was on his way home.

16 The Defendant also checked on the status
17 of the life insurance policies and determined that
18 the premiums paid were up to the end of 2001, and
19 advised Jackson of the same. Pursuant to her plan
20 to kill Fingerhut, the Defendant took Jackson to a
21 motel room in Boardman, Ohio, and rented the room
22 for one week which was consistent with the plans

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1 discussed in the letters and phone calls prior to
2 the murder.

3 Upon discovering Fingerhut's body, the
4 Defendant feigned grief exactly as discussed in her
5 letters with Jackson. During the course of the
6 investigation, the Defendant continually threw out
7 red herrings to the Howland Police by mentioning a
8 number of possible suspects, including alleged
9 homosexual lovers of the victim, her ex-boyfriends,
10 crazy people from the bus terminal in Youngstown,
11 and Santiago Mason. The Defendant only mentioned
12 Jackson, the convict she had corresponded with by
13 letters for three months, spoken to on the
14 telephone 19 times, picked up from prison and
15 engaged in sexual relations with just two days
16 prior, taken to get a haircut and ate dinner with
17 just hours previously and the person whom she had
18 driven to Boardman, Ohio on the night of the
19 murder, and who had an injured index finger, only
20 after the investigators confronted her with his
21 name.

22 From the aforementioned evidence, the

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1 Court concludes that the Defendant committed the
2 aggravated murder as a complicitor, while
3 committing or attempting to commit or in fleeing
4 immediately after committing or attempting to
5 commit aggravated burglary. And that the Defendant
6 committed the aggravated murder with prior
7 calculation and design. With respect to the
8 aggravating circumstance related to the aggravated
9 robbery, after Jackson had murdered the victim, he
10 took the victim's set of keys and the silver
11 Chrysler, 300-M. Although the planned crime
12 involved Jackson stealing Fingerhut's car in order
13 to kidnap Fingerhut, it is clear that Jackson was
14 to take the victim's car to flee the residence.

15 The fact that Fingerhut struggled with
16 Jackson in the residence and was killed in the
17 residence, in no way, negates the Defendant's plan
18 that Jackson should steal the victim's car to
19 facilitate Jackson's own flight from the residence.
20 Ample DNA evidence was presented indicating that
21 Jackson was in the silver Chrysler 300-M following
22 the murder of Fingerhut. Additionally, phone

1 records were introduced showing that Jackson and
2 the Defendant called each other after the murder to
3 check on the status of the plan.

4 Finally, the vehicle was recovered a few
5 blocks from the location where Jackson was
6 arrested. The Defendant, in accordance with the
7 plan to kill Fingerhut, paid for a hotel room for
8 Jackson following the murder. The fact that the
9 silver Chrysler 300-M was found abandoned with the
10 victim's keys in the ignition, coupled with the
11 fact that the victim's wallet, money, credit cards
12 and other valuables were not stolen, clearly shows
13 that the plan to steal the victim's car with a
14 means of escape following the kidnapping and murder
15 of the victim was carried out in accordance with
16 the prior calculation and design, as set out by the
17 Defendant and Jackson.

18 From the aforementioned evidence, this
19 Court concludes that the Defendant committed the
20 Aggravated Murder, as a complicitor, while
21 committing or attempting to commit or in fleeing
22 immediately after committing or attempting to

1 commit aggravated robbery, and that the Defendant
2 committed the aggravated murder with prior
3 calculation and design.

4 Now, to be weighed against the
5 aggravating circumstances, the Court must weigh any
6 mitigating factors. On Tuesday, June 3, 2003, the
7 Defendant appeared in-chambers and on the record
8 with her retained attorneys, J. Gerald Ingram and
9 John B. Juhasz, and her retained psychologist,
10 Thomas Eberle. The State was present and
11 represented by Assistant prosecutor Kenneth N.
12 Bailey and Christopher D. Becker.

13 At that time, the Defense indicated to
14 the Court that the Defendant had been evaluated by
15 Dr. Eberle for her competency to waive mitigating
16 evidence. And that in the doctor's opinion, she
17 was competent to do same.

18 This Court personally addressed the
19 Defendant and inquired of her as to the importance
20 of presenting mitigating evidence, the use of such
21 evidence to offset the aggravating circumstances,
22 and the effect of failing to present such evidence.

1 The Court was assured at that time by the
2 Defendant, that she understood these concepts by
3 both Defense counsel and Dr. Eberle. This Court
4 personally inquired whether the Defendant desired
5 to waive the right to present mitigating evidence.
6 The Court having found no evidence to contradict
7 Dr. Eberle's findings on the Defendant's
8 statements, and her express desire to waive the
9 presentation of mitigating evidence, then found
10 that the Defendant was competent to waive her
11 presentation of mitigating evidence, and had done
12 so knowingly, voluntarily and intelligently, and
13 the Defendant indicated to the Court, that she only
14 desired to make an unsworn statement to the Jury,
15 which she was advised she was permitted to do and
16 would be permitted to make on June 4, 2003, which
17 was the date previously scheduled for the
18 mitigation or second phase.

19 On Wednesday, June 4, 2003, the Defendant
20 made an unsworn statement during which she stated
21 to the Jury that there were no mitigating factors,
22 and during which she requested the Jury to impose

1 the death sentence. This statement was articulate,
2 coherent and well organized. The statement lasted
3 approximately one hour, during which the Defendant
4 showed no difficulty or fear in addressing a large
5 group of individuals, including the Jury, and a
6 large number of Courtroom observers. The Defendant
7 spoke freely and although she had with her prepared
8 notes, she often extemporized.

9 Despite the preceding that I have
10 outlined, the Court is still bound to make an
11 independent weighing of any and all mitigating
12 factors that it feels may exist in this case
13 against the aggravating circumstances. The
14 Defendant in this case was not the principal
15 offender. Pursuant to section 2929.04 (B)(6), the
16 Court considers this factor, but gives it very
17 little weight.

18 The Defendant committed the Aggravated
19 Murder during the course of the commission of both
20 an aggravated burglary and aggravated robbery. The
21 record is replete with instances where the
22 Defendant actively planned this Aggravated Murder

1 with prior calculation and design in order to
2 collect \$550,000 in life insurance proceeds. The
3 Defendant's plan included buying her codefendant a
4 new Cadillac or Lincoln in exchange for killing her
5 ex-husband, promises of trips, a nice home in a
6 wealthy neighborhood, an overall 180 degree change
7 in life style for Nathaniel Jackson, her
8 codefendant.

9 The record is overwhelming that, but for
10 the Defendant's planning and actions, the victim
11 would be alive today. The Defendant discussed and
12 planned for months with the principal offender, how
13 they would kill the victim. The Defendant checked
14 on the status of the insurance policies in order to
15 ensure that she would be able to collect the
16 proceeds, and advised the principal offender of the
17 status of the policies. The Defendant then
18 transported the principal offender in the
19 Aggravated Murder from prison to a predetermined
20 location, in order to engage in love making before
21 the murder.

22 The Defendant fed the principal offender

1 prior to the crime. The Defendant provided the
2 principal offender with gloves, a ski mask, murder
3 weapon and hideout after the Aggravated Murder, all
4 as planned and discussed prior to the Aggravated
5 Murder.

6 The Defendant gave the principal offender
7 entry into the residence of the victim for the sole
8 and exclusive purpose of killing the victim. This
9 plan was clearly discussed in both the letters, and
10 recorded telephone conversations, including the
11 last telephone call on December 8, 2001, the day
12 before the principal offender was released from
13 prison. The Defendant failed to advise police of
14 her relationship with the principal offender until
15 she was confronted with the evidence of the
16 relationship by the police. And prior to being
17 confronted by the existence of this relationship,
18 the Defendant gave the police a number of red
19 herrings implicating a number of potential
20 suspects, but never mentioned the relationship with
21 the principal offender, and her discussions with
22 him regarding the Aggravated Murder of Robert

1 Fingerhut.

2 The Court gives very slight weight to the
3 fact that the Defendant indicates in her letters
4 that the victim may have been physically abusive to
5 her. This factor is pursuant to section 2929.04
6 (B)(1)(2). However, the existence of this factor
7 is given very slight weight due to the fact that it
8 is unsubstantiated, and even if it were true, would
9 not warrant the Defendant's action in this case.

10 The Court gives very little weight to the
11 Defendant's unsworn statement. During the course
12 of her unsworn statement the Defendant apologized
13 to her Defense team and thanked them for the hard
14 work. The few positive things gleaned from this
15 statement were overshadowed by the Defendant's
16 personal attacks, and statements that were clearly
17 contrary to the evidence. The Defendant denied
18 guilt and personally attacked the jurors by
19 claiming they were not a judge of her peers, not a
20 Jury of her peers.

21 The Defendant accused the lead
22 investigator as being motivated solely by career

1 advancement and accusing him of obstruction of
2 justice and perjury. The Defendant referred to the
3 other investigators as lackeys and claimed that one
4 member of the Prosecution team was anti-Semitic and
5 racist.

6 The Defendant also chastised jurors for
7 being uninformed about current events. The
8 Defendant also stated to the Jury that she and the
9 victim had a loving relationship, and planned to
10 live happily ever after.

11 These statements are in direct
12 contravention of her statements in the letters and
13 the phone calls expressing her desire and wishes
14 that the victim meet an untimely death, and her
15 desire to marry and live with Nathaniel Jackson.

16 The Defendant also appeared to brag to
17 the Jury that she and the deceased have earned over
18 \$200,000 per year and that the \$550,000 in life
19 insurance proceeds was of little value to her,
20 because of that sum would only sustain her for a
21 few years. It is difficult for this Court or any
22 finder of fact to give any weight to such a

1 statement.

2 Pursuant to section 2929.04 (A)(7), the
3 Court will give very slight weight to the
4 Defendant's behavior during the course of this
5 trial. The Defendant was courteous, pleasant and
6 properly addressed the Court at all times. The
7 Defendant appeared intelligent and interested in
8 the proceedings, and appeared to assist in her
9 defense at all times. The Defendant presented no
10 security problems to this Court and those who
11 transported her to Court each day.

12 Now the Court has carefully and
13 independently weighed the accumulation of all of
14 the mitigating factors against each aggravating
15 circumstance separately, as to each of the two
16 specifications. In other words, the Court has
17 weighed the evidence twice, first the Court weighed
18 all of the mitigating factors against the
19 aggravating circumstances surrounding the
20 aggravated burglary, and then the Court engaged in
21 second weighing, whereby the Court again weighed
22 all of the mitigating factors against the

1 aggravating circumstances surround the aggravating
2 robbery.

3 With respect to the first weighing of the
4 aggravating circumstances relating to the
5 aggravated burglary against all of the mitigating
6 factors, this Court finds that the aggravating
7 circumstances not only outweigh the mitigating
8 factors by proof beyond a reasonable doubt, but in
9 fact, they almost completely overshadow them.

10 The legislature of the State of Ohio, has
11 recognized that under certain circumstances, the
12 death penalty is an appropriate sanction to a
13 Defendant who commits an Aggravated Murder during
14 the commission of certain felonies. In the case at
15 bar, the underlying felonies were aggravated
16 burglary and aggravated robbery. In this
17 particular case, the Court accords substantial
18 weight to the aggravated burglary specification and
19 the weighing process.

20 In order to prove an aggravated burglary,
21 the State is required to prove that a Defendant
22 trespassed in an occupied structure, for the

1 purpose of committing a criminal offense. In this
2 particular case, the Defendant purposely had her
3 codefendant trespass in the occupied structure of
4 Robert S. Fingerhut, with the specific purpose of
5 committing an Aggravated Murder, which had been
6 meticulously planned over a number of months with
7 prior calculation and design.

8 Under the facts of this case, this Court
9 cannot see any other form of aggravated burglary
10 where the weight of this particular aggravating
11 circumstance could ever be greater. The evidence
12 reveals that the aggravated burglary was committed
13 for the sole purpose of killing Robert S.
14 Fingerhut, pursuant to a planned and methodical
15 execution scheme designed by the Defendant and her
16 codefendant and whereby the Defendant would collect
17 \$550,000 in insurance proceeds. This is a most
18 heinous form of aggravated burglary and is entitled
19 to unsurpassed weight.

20 In this Court's view, this aggravating
21 circumstance standing alone, outweighs all of the
22 mitigating evidence in this case. Therefore, with

1 respect to Specification One to Count One, this
2 Court concurs with the Jury's recommendation, and
3 finds that the death sentence is an appropriate
4 penalty.

5 With respect to the aggravating
6 circumstances of the aggravated robbery, the Court
7 concedes that this offense is not quite heinous as
8 the circumstances surrounding those concerned with
9 the aggravated burglary; however, the aggravated
10 robbery was clearly committed to facilitate the
11 escape from the Aggravated Murder, and is extremely
12 close to being the worst form of aggravated
13 robbery. This statement is galvanized by the fact
14 that the aggravated robbery was planned by the
15 Defendant to be part of a kidnapping, whereby the
16 victim was to be removed, taken to a different
17 location where the Defendant would then engage in
18 oral sex with her codefendant, while the Defendant
19 was forced to watch prior to his execution. This
20 plot is clearly spelled out in the letters between
21 the Defendant and codefendant. The plan clearly
22 went awry when the victim engaged the codefendant

1 in the struggle at the residence. Again this
2 scheme was hatched for the purpose of the Defendant
3 collecting the \$550,000 in insurance proceeds.

4 Therefore, the aggravating circumstance
5 specification relating to the aggravated robbery,
6 when weighed against all of the mitigating factors
7 in this case, clearly and undeniably outweighs by
8 proof beyond a reasonable doubt, all of the
9 mitigating evidence in this case.

10 Therefore, with respect to Specification
11 Two to Count One, the Court concurs with the Jury's
12 recommendation and finds that the death sentence is
13 the appropriate penalty. The Court recognizes that
14 the death sentence recommendation by the Jury must
15 be merged and the Court does hereby merge the death
16 sentences for purposes of sentencing.

17 For the reasons set forth herein, and
18 after independently and separately weighing the
19 aggravating circumstances against all of the
20 mitigating factors, it is the judgment of this
21 Court that the Jury's recommendation is accepted,
22 and the Court does find that the sentence of death

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1 is the appropriate penalty in this case.

2 Counsel approach the bench, please.

3 (SIDE BAR DISCUSSION, OFF THE RECORD AND OUT OF
4 HEARING)

5 THE COURT: The Court has asked at
6 side bar if counsel for either side wish to place
7 anything on the record before this Court proceeds
8 with sentencing. Mr. Ingram, I believe you wish to
9 address something.

10 MR. INGRAM: Your Honor, the record
11 should reflect that in pronouncing sentence, you
12 have apparently read from a written decision that
13 you have prepared in advance. I guess I would ask
14 if I am correct in that assumption?

15 THE COURT: That is correct.

16 MR. INGRAM: As you read that
17 decision, Mr. Bailey sat at the Prosecution table
18 and reviewed a document as if he was reading along.
19 Every time you turned the page, Mr. Bailey turned
20 the page. I would now ask on the record, that
21 Mr. Bailey be required to identify the documents
22 which are sitting in front of him.

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1 THE COURT: Mr. Bailey is referring
2 to a document that I have had prepared. I have
3 outlined the sum and substance of it to the
4 Prosecution. They have a computer over there which
5 you are aware of, Mr. Ingram, we have used
6 throughout the trial, which makes it convenient to
7 correct, delete from a master copy and to come up
8 with a form that is present, which I presently
9 used.

10 MR. INGRAM: Well, the record should
11 reflect the vehement Defense objection to the
12 State's participation in the drafting of the
13 Court's sentencing decision in ex parte proceeding.
14 We did not know this, we did not know of this.
15 That is prohibited. I would ask that those
16 documents be sealed and become part of the
17 Appellate record in this case.

18 THE COURT: That will be done.

19 MR. INGRAM: I would ask that they
20 be given to the Court Reporter at this point.

21 THE COURT: Mr. Bailey, please
22 deliver that copy.

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1 MR. INGRAM: May I see it? May I
2 ask Your Honor, when at what point in time, the
3 exchanges between you and Mr. Bailey occurred?

4 THE COURT: I don't recall. That
5 was probably about Wednesday.

6 MR. INGRAM: Was there one such
7 exchange or more than one exchange?

8 THE COURT: I believe that there was
9 one exchange.

10 MR. INGRAM: We would also note an
11 objection to the Court's depriving the Defendant of
12 the right of allocution. We object to the Court
13 depriving the Defendant of her right of allocution.

14 THE COURT: Your objection is noted.

15 MR. BAILEY: We haven't reached a
16 point of allocution yet. We're just getting to
17 that point. The Court had to do the independent
18 weighing and now we're at the point where the Court
19 has to advise the Defendant of her Appellate rights
20 and of allocution.

21 THE COURT: I have to advise of Rule
22 32 now.

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1 MR. JUHASZ: The objection is
2 because the Court has already determined sentence
3 without having heard from the Defendant. Normally
4 in sentencing proceedings, the Court hears from the
5 Defendant before making a determination of the
6 appropriate sentence. That is the basis for the
7 objection.

8 THE COURT: Okay. Could I see
9 counsel?

10 (In-chambers at 2:30 p.m.)

11 (OFF THE RECORD)

12 THE COURT: We're in-chambers in
13 conference. Are you waiving presence of the
14 Defendant?

15 MR. INGRAM: Yes.

16 THE COURT: Mr. Ingram, you have
17 another question?

18 MR. INGRAM: Based upon our exchange
19 a few moments ago in the Courtroom, it is my
20 understanding that a draft or some document
21 relating to the Court's pronouncement of sentence
22 was provided to the Prosecuting Attorney on

1 Wednesday.

2 THE COURT: I believe it was
3 Wednesday. I asked them to type this up and get a
4 copy back, so that we would all have it when I was
5 reading through it. You weren't given a copy of
6 it, and I apologize for that.

7 MR. INGRAM: We should probably ask
8 that that document that was provided to the
9 Prosecuting Attorney on Wednesday also be marked
10 and sealed as part of the Court's Exhibit in this
11 matter.

12 THE COURT: Okay.

13 MR. BAILEY: The only thing left is
14 the final one. All prior ones were thrown out.
15 There were six or seven of them.

16 MR. INGRAM: There's six or seven
17 drafts?

18 MR. BAILEY: Not six or seven
19 drafts, there's one draft and there's corrections
20 and all of the corrections with the draft were
21 pitched.

22 MR. INGRAM: Who made the

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1 corrections?

2 MR. BAILEY: We made or the Court.
3 We kept finding typo's.

4 THE COURT: Whatever you have, if
5 you have something, bring it over.

6 MR. BECKER: Let me explain
7 something here. This is my understanding of what
8 we were supposed to do. We were to take that and
9 put it on the computer and print out the hard copy
10 of the sentencing order, which is what we did. As
11 Ken and I would proofread it for typographical
12 errors, it was changed and just saved on the hard
13 drive of the computer. It was never printed out
14 and kept as draft after draft after draft. I would
15 type over the hard drive, and prepare it.
16 Eventually a final copy was provided to the Court
17 and I think the Court had some typographical errors
18 and maybe some changes.

19 THE COURT: I made one phone call
20 back to you.

21 MR. BECKER: And the Court had
22 indicated some changes. I just simply changed

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1 that. Essentially what I did, because I typed the
2 whole thing was I was the Court's typewriter, the
3 Court's secretary.

4 THE COURT: We used that -- we don't
5 have the equipment here or the know-how to do
6 things expeditiously. That is the way we were able
7 to get the final instructions.

8 MR. BECKER: That is the way Jury
9 instructions are done. Now I think --

10 THE COURT: We have had this come
11 up. Tony Consoldane always raises this issue about
12 the Prosecutor typing stuff as if the Prosecutor
13 is -- and it may be a legitimate point, I don't
14 know. It is the system that is used here because
15 it is the most practical.

16 MR. INGRAM: Does anybody have the
17 first draft? They do not. Do you?

18 THE COURT: No. I don't have
19 anything, no.

20 MR. INGRAM: Who wrote the first
21 draft?

22 THE COURT: I gave notes saying this

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1 is what I want. This, this and this, and they sent
2 it back. I read it over, made some corrections,
3 went back from there.

4 MR. INGRAM: The record should
5 simply reflect that in this process, Defense
6 counsel was never involved, nor consulted. Other
7 than that, I have nothing further.

8 MR. BECKER: I just want to address
9 something on record here. Rule 32 states that
10 sentence shall be imposed without unnecessary
11 delay. Sentence shall be imposed without
12 unnecessary delay. Pending sentence, the Court may
13 commit the Defendant or continue or alter the bail.
14 At the time of imposing sentence, and it doesn't
15 necessarily say before sentence is imposed, it says
16 at the time of imposing sentence, the Court shall
17 do all of the following: Afford counsel an
18 opportunity to speak on behalf of the Defendant and
19 address the Defendant personally and ask if he or
20 she wishes to make a statement in his or her own
21 behalf; afford the Prosecution to make an
22 opportunity to speak; afford the victims the right

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1 provided by law; and then notify and then after --
2 it is very specific, the rule says after imposing
3 sentence in a serious offense, the Court shall
4 advise the Defendant has the right to appeal. I
5 think what is important is Rule 32 does not say
6 before imposing sentence, Defendant or counsel
7 should be afforded an opportunity, it says at the
8 time of imposing sentence. We haven't had the
9 sentence. I don't think the actual sentence has
10 been handed down. That is an important
11 distinction. The Court by law had to make an
12 independent weighing and circumstances.

13 THE COURT: Well, the record is
14 clear as to what has happened. If you have a point
15 on appeal, you have got a point on appeal.

16 MR. INGRAM: Thank you.

17 (End of in-chamber discussion)

18 (Back in Open Court)

19 THE COURT: Gentlemen, would you
20 have your client come forward, please? Does the
21 Defendant wish to address anything prior to
22 sentencing?

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1 THE DEFENDANT: Yes, I think I
2 would. I would like to have one of those notes
3 back. Short and sweet this time. You probably
4 wonder why I did what I did about asking for the
5 death penalty. Because I think one small voice for
6 justice is going to count. Maybe if it is for only
7 one person some day. I didn't want to take the
8 stand on race equality and the criminal justice
9 system. Criminal justice, an oxymoron, and two, to
10 expose and ask corrupt police officials who use a
11 badge to destroy rather than protect lives for
12 their own gain by committing perjury, planting and
13 transferring evidence, tampering, and using race
14 and religion to condemn. Thank you.

15 Thank you for your decision. I was a
16 little worried you might try to find something not
17 to do that. I appreciate what you did. Thank you.

18 MR. INGRAM: The record should
19 reflect my migraine has returned. We have nothing.

20 THE COURT: Counsel have nothing
21 further?

22 MR. INGRAM: No.

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1 THE COURT: Miss Roberts, you have a
2 right to appeal the conviction filed in this case.
3 I would ask you, it is my duty to appoint counsel
4 to perfect that appeal for you. I have had some
5 indication from someone that you may wish to hire
6 your own counsel or do you wish the Court to
7 appoint someone to represent you?

8 MR. INGRAM: May I answer this
9 question?

10 THE COURT: Yes.

11 MR. INGRAM: The appeal in this
12 matter would be due in 45 days. Donna, along with
13 Mr. Juhasz and I will make Appellate decisions in
14 due course, and at this time, there's no request
15 for Court appointed Appellate counsel.

16 THE COURT: There's no request?

17 MR. INGRAM: No request not at this
18 juncture.

19 THE COURT: I would ask you to
20 apprise me, because the Supreme Court insists that
21 within a certain time period, within two weeks, I
22 have to either appoint Appellate counsel or they

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1 are not completely happy with me.

2 MR. INGRAM: Okay.

3 THE COURT: As I said, you have an
4 absolute right to file an appeal in this case, it
5 would be the Supreme Court to review the actions of
6 this Court and this Jury. If you are unable to pay
7 the cost of that appeal, the appeal will be
8 perfected with no cost to yourself and counsel will
9 be appointed with no cost to you. Any papers,
10 other expenses you are unable to pay for will be
11 provided by this Court. You have the right to have
12 a notice of timely appeal filed on your behalf. If
13 you fail to do that, this Court will see that that
14 is done. Do you have any other questions about any
15 of that at this time?

16 THE DEFENDANT: No. Jerry says no.

17 THE COURT: Anything that the
18 Defense or the Prosecution wish to place on the
19 record at this time before the Court enters
20 sentence?

21 MR. INGRAM: Only that you take this
22 and mark it as a Court's Exhibit for sentencing

1 purposes.

2 THE DEFENDANT: I just request that
3 that fairy tale you told, not be told to children
4 at night. Thank you.

5 THE COURT: The Court has considered
6 the record and oral statements made as well as the
7 principles and purposes of sentencing under Ohio
8 Revised Code 2929.11, and has balanced the
9 seriousness and recidivism factors of O.R.C.
10 Section 2929.12. Pursuant to law, the Trial Court,
11 this day, June 20, 2003, having determined in a
12 separate opinion of specific findings that the
13 aggravating circumstances as to the count of
14 Aggravated Murder, outweigh the mitigating factors
15 by proof beyond a reasonable doubt, then made
16 inquiry as to whether the Defendant had anything to
17 say, why judgment should not be pronounced against
18 her. And the Defendant in answer showed no good
19 cause or sufficient reason why sentence should not
20 be pronounced. Are you wondering what I am reading
21 from?

22 MR. INGRAM: I am wondering what

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1 Mr. Bailey is reading from. Mr. Bailey is reading
2 from a sentence.

3 MR. BAILEY: This is Nathaniel
4 Jackson's.

5 THE COURT: This is a copy of
6 Nathaniel Jackson's, which I have altered. The
7 Court has considered the factors under Ohio Revised
8 Code 2929.14 and makes the following findings. The
9 shortest prison term will demean the seriousness of
10 the Defendant's conduct; two, the longest prison
11 term is appropriate because the Defendant committed
12 the worst form of the offense; number three,
13 multiple prison terms are necessary to protect the
14 public from future crime and to punish the
15 offender; number four, consecutive prison sentences
16 are not disproportionate to the seriousness of the
17 Defendant's conduct and to the danger the
18 Defendant, the offender, opposes to the public.
19 Five, the harm caused by the multiple offenses was
20 so great that no single prison term for any of the
21 offenses committed as part of a single course of
22 conduct adequately reflects the seriousness of the

1 Defendant's conduct.

2 It is therefore Ordered and Adjudged and
3 Decreed that the Defendant, Donna M. Roberts, be
4 taken from the Courtroom to the Trumbull County
5 jail, and from thence to the correction reception
6 center at Lorain -- I'm sorry, at Marysville, Ohio.

7 Counsel approach for a moment, please.

8 (SIDE BAR DISCUSSION, OFF THE RECORD AND
9 OUT OF HEARING)

10 THE COURT: I'll read this over
11 again. It is therefore Ordered and Adjudged and
12 Decreed that Defendant, Donna M. Roberts, be taken
13 from the Courtroom to the Trumbull County jail,
14 from thence to the correction reception center at
15 Marysville, Ohio, and thereafter be sentenced to
16 death on January 11, 2004 on Count One. And
17 imprisoned therein for the stated prison term of
18 ten years on Count Three, plus a mandatory term of
19 three years on the firearms specification, to be
20 served prior to and consecutive to the sentence
21 imposed in Count Three. Ten years on Count Four,
22 plus a mandatory term of three years on the

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1 firearms specification, to be served prior to and
2 consecutive to the sentence imposed in Count Four.
3 Sentence in Count Four to be served consecutively
4 to the sentence imposed on Count Three. The
5 firearms specification in Counts Three and Four
6 shall merge as one sentence in Count Three as
7 matter of law.

8 The Defendant is ordered to pay the cost
9 of prosecution, once that is determined, for which
10 execution is awarded. That is the judgment of this
11 Court.

12 Miss Roberts, I can't think of a more
13 unpleasant thing that anybody is called upon to do
14 than to sit here and review a record like this.

15 THE DEFENDANT: I know.

16 THE COURT: My heart goes out to
17 everyone that was involved in this thing. I think
18 as most people who look at it, think that you used,
19 you appear from all of the contact I have had with
20 you, to be a normal person, which makes it more
21 difficult to explain the actions that the State has
22 been able to put forth. And it almost appears to

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1 me that it was an abandoned, where there was no
2 thought of what was going to happen tomorrow or the
3 next day or down the road, almost some sort of a
4 fantasy world that you were living in. But all of
5 our actions have consequences, and sadly, yours
6 have brought you to this point. I do say this,
7 with heartfelt sincerity though, I wish you well.

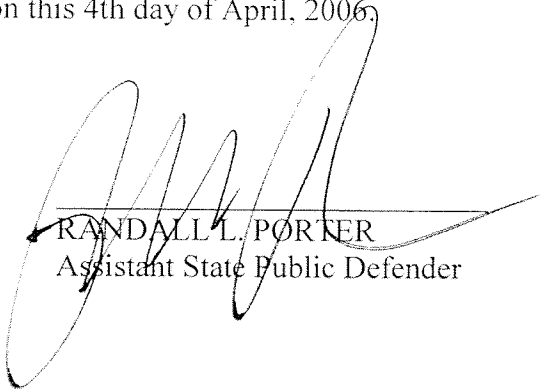
8 THE DEFENDANT: Thank you, Sir.

9 MR. INGRAM: Thank you.

10 (End of Sentencing Hearing at 3:00 p.m.)
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Volume II Appendix to Nathaniel E. Jackson's Notice of Application for Reopening was forwarded by regular U.S. Mail to Dennis Watkins, Trumbull Count Prosecuting Attorney and Luwayne Annos Assistant Prosecution Attorney, Trumbull County Prosecutor's Office, 160 High Street, N.W., 4th Floor Administration Building Warren, Ohio 44481 on this 4th day of April, 2006.



RANDALL L. PORTER
Assistant State Public Defender

104-373

ON COMPUTER-KMR

FILED

The Supreme Court of Ohio

OCT 04 2006

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio

Case No. 03-137

v.

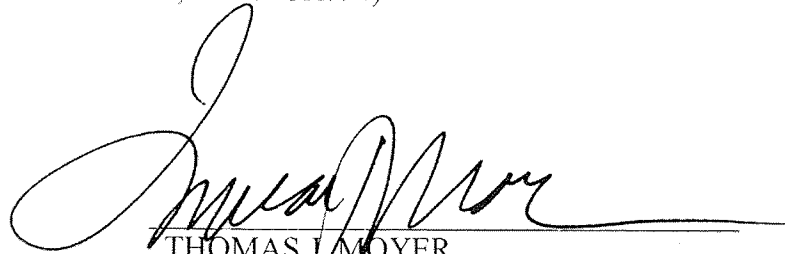
ENTRY

Nathaniel E. Jackson

This cause came on for further consideration upon the filing of an application for reopening under S.Ct.Prac.R. XI(6). Upon consideration thereof,

It is ordered by the Court that the application is denied.

(Trumbull County Court of Common Pleas; No. 01CR794)



THOMAS J. MOYER
Chief Justice

ORIGINAL

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

ON COMPUTER - HUG

William K. Suter
Clerk of the Court
(202) 479-3011

April 5, 2006

Clerk
Supreme Court of Ohio
65 South Front Street
Columbus, OH 43215-3431

Re: Nathaniel E. Jackson
v. Ohio
No. 05-10187
(Your No. 2003-0137)

Dear Clerk:

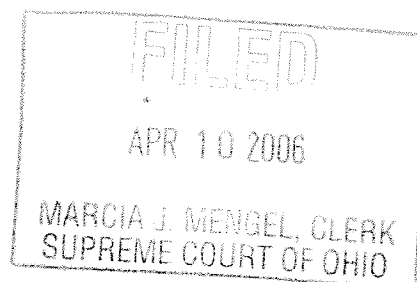
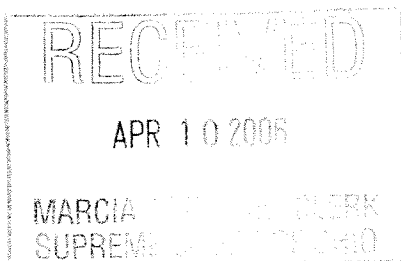
The petition for a writ of certiorari in the above entitled case was filed on April 3, 2006 and placed on the docket April 5, 2006 as No. 05-10187.

Sincerely,

William K. Suter, Clerk

by

Gail Johnson
Case Analyst



ORIGINAL
ON COMPUTER - JJ

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellee,

-vs-

NATHANIEL JACKSON,
Appellant.

CASE NO. 03-137

Death Penalty Case

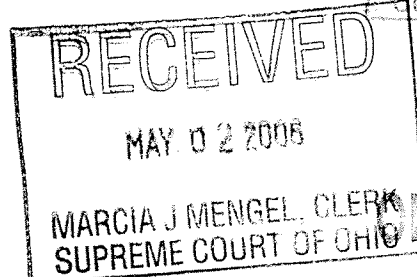
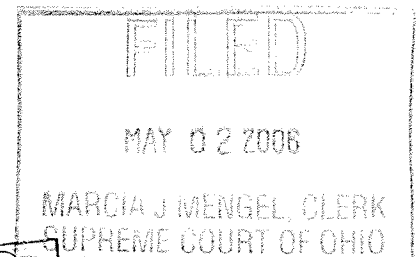
On Appeal from the Trumbull
County Court of Common Pleas
No. 01 CR 794

MEMORANDUM OF LAW IN OPPOSITION TO APPELLANT'S
APPLICATION FOR REOPENING PURSUANT TO
S.C.T. PRAC. R. XI, Section 6(C)

DENNIS WATKINS
Ohio Reg. No. 0009949
LuWAYNE ANNOS
Ohio Reg. No. 0055651
Trumbull County Prosecutor's Office
160 High Street N.W.
4th Floor, Administration Bldg.
Warren, Ohio 44481
(330) 675-2426

COUNSEL FOR THE STATE OF
OHIO

DAVID H. BODIKER
No Ohio Reg. No. Provided
Ohio Public Defender
RANDALL L. PORTER
Ohio Reg. No. 0005835
Assistant Ohio Public Defender
Office of the Ohio Public Defender
8 East Long Street - 11th Floor
Columbus, Ohio 43215
COUNSEL FOR APPELLANT



MEMORANDUM OPPOSING APPELLANT'S MOTION FOR RECONSIDERATION

Procedural History:

In November 2002, following a jury trial of approximately four weeks, Defendant-Appellant Nathaniel Jackson was found guilty of two counts of aggravated murder, one count of aggravated burglary, and one count of aggravated robbery in connection with the shooting death of Robert Fingerhut. Under both of the aggravated murder counts, the jury also returned a guilty verdict on two death penalty specifications. In addition, under each of the aggravated burglary and aggravated robbery counts, he was found guilty of a firearm specification. The trial court sentenced Appellant to death. At trial, Appellant was represented by Atty. James Lewis and Atty. Anthony Consoldane of the Trumbull Branch of the Office of the Public Defender.

For purposes of his direct appeal to this Court, the trial court appointed Atty. John P. Laczko of Youngstown, Ohio and Atty. Dennis Day Lager of Canton. This Court unanimously affirmed Appellant's conviction and death sentence in *State v. Jackson* (2006), 107 Ohio St. 3d 300, 2006-Ohio-1. Appellant now seeks to reopen his direct appeal to this Court with the aid of the Ohio Public Defender's Office which has filed an Application for Reopening Pursuant to S.Ct.Prac. R. XI, Section 5(sic). He is now represented by Atty. David Bodiker and Atty. Randall Porter, who allege Attys. Laczko and Lager were ineffective in their representation of Appellant in his direct appeal. For the reasons set forth below, the Plaintiff-Appellee The State of Ohio ("State") files the following memorandum in opposition pursuant to S.Ct. Prac. R. XI, Sec. 6(C).

LAW AND ARGUMENT

Before *briefly* individually addressing each of Appellant's eleven propositions of law in

the space allotted by S.Ct. Prac. R. XI, Sec. 6(D), the State will review relative authority concerning Applications for Reopening of appeals. By this Court's own rule, S.Ct. Prac. R. XI, Sec. 6(E) and its companion appellate rule, App. R. 26(B)(5), Appellant must demonstrate that there is a "genuine issue" as to whether the applicant was denied effective assistance of appellate counsel.

Moreover, the two-prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 687, is the appropriate standard to determine whether a criminal defendant received ineffective assistance of appellate counsel. *State v. Goff* (2003), 98 Ohio St. 3d 327, 2003-Ohio-1017 at ¶4. Further, to justify reopening his appeal, Appellant "bears the burden of establishing that there is a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey* (1998), 84 Ohio St. 3d 24, 25.

In order to show ineffective assistance, Appellant must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had those claims been presented on direct appeal. *State v. Sheppard* (2001), 91 Ohio St. 3d 329, 330. In addressing an alleged error, appellate counsel is not required to advance every conceivable argument in order to provide the type of effective representation that the Sixth Amendment requires. *State v. Sleppy* (March 5, 1999), 2nd Dist. No. 96 CA 1412 at * 7. Based on the foregoing authority, this Court can find no reason to reopen Appellant's appeal.

Proposition of Law No. I

The knowing, intelligent, and voluntary waiver of Appellant's rights has been thoroughly addressed in this Court's opinion. *Jackson*, supra, ¶78-100. "[T]he trial court's finding that Jackson was properly advised of his *Miranda* rights and that he waived those rights is amply

supported in the record.” Id. at ¶100. Appellant supplies no authority to this Court to suggest that people who are high school drop outs and on some unspecified medication cannot knowingly and intelligently waive their rights and speak with the police.

Proposition of Law No. II

A review of the testimony submitted by Appellant with his memorandum shows that prospective jurors Fenton, Bowers, Jigert, McCale and Davis made it perfectly clear that they could not follow the court’s instructions and vote in favor of the death penalty, even if the State proved that the aggravating circumstances outweighed the mitigating factors. This Court has held that “the proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.” *State v. Rogers* (1985), 17 Ohio St.3d 174, 178, vacated and remanded on other grounds (1985), 474 U.S. 1002. It is plain even from the record submitted by Appellant that these potential jurors were prevented or substantially impaired in the performance of their duties as a death penalty juror. As such, the trial court committed no error in the dismissal of these jurors for cause.

With respect to Mr. Fenton, the State would note that defense counsel did not object to his dismissal. (T.p. 719). This Court can only take notice of the error if it rises to the level of plain error. Crim.R. 52(B). In order for this Court to apply Crim.R. 52(B), it must be clear that the outcome of the trial would have been different but for the alleged error. See *State v. Lane* (1995), 108 Ohio App.3d 477, 482. The transcript presented by Appellant reveals that even if trial counsel had objected, Mr. Fenton would have been dismissed for cause because his beliefs

rendered him incapable of performing his duties as a capital juror.

Proposition of Law III

Appellant alleges that defense counsel failed to “adequately question” potential jurors Cuttings, Hook, Miller, Zdunick, Miller, Menten and DeJoy. Appellant fails to state why these voir dires were inadequate, or what trial counsel should have done to improve their performance. Therefore, if Appellant cannot articulate at this juncture how his trial counsel were ineffective, he certainly cannot find error in his appellate counsel for failure to raise these non-articulated issues.

With respect to prospective jurors Jones, Schrecengast, Zdunick, Melinda, and Schoonover, again, Appellant cites to no reasons in the record why trial counsel should have objected to their inclusion in the jury pool, and what possible outcome determinative effect this failure to object would have had on appeal.

Proposition of Law No. IV

Appellant misstates the holding in *Peters v. Kiff* (1972), 407 U.S. 493, by saying that an “underrepresentation of African-American[sic] in the petit jury constituted a denial of the Due Process Clause of the Fourteenth Amendment.” (Appellant’s Application at 4). In fact, the *Peters* case dealt with the systematic *exclusion* of African Americans from a grand jury. Appellant has never presented evidence to prove his baseless theory that African-Americans were culled from his jury pool. Judging by the arguments presented in this application, he would be unable to do so if this Court were to reopen this appeal. To demonstrate that there has been a violation of the fair cross-section requirement, a defendant must show: “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of

such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Duren v. Missouri* (1979), 439 U.S.357, 364.

The mere absence of African-Americans in the jury pool is not dispositive of a systematic exclusion. There is nothing in Appellant’s application to suggest that a systematic exclusion of *anybody* occurred. Therefore, his appellate counsel were not ineffective in excluding this non-issue on direct appeal.

Proposition of Law No. V

Appellant alleges the trial court admitted “a voluminous amount of hearsay.” Apparently, Appellant’s idea of “voluminous” is 14 pages, because that’s all he cites to in his application. (Appellant’s Application at 5). Nonetheless, as for the cite at T. p. 2196, this is the cross examination of Frank Reynolds. The defense did not object to their own questions, and appellate counsel were not ineffective for failing to raise that on appeal. Det. Monroe, in identifying State’s Ex. 311, the Days Inn Receipt indicating Donna Roberts paid for a room there December 11 through 17, 2001, indicated that the time stamp was incorrect based upon information he received from Det. Dillon. Dillon himself took the stand and explained the discrepancy of 46 minutes. (T.p. Vol. 2471-2472.). Therefore, any error, even if raised would be harmless.

With respect to the cite at T.p, 2322, defense counsel complained about alleged hearsay statements by witness Paul Monroe, yet acknowledged he failed to object because he didn’t want to annoy the jury. Trial counsel did not identify these instances for the trial court. Appellant does not identify them in his application. Therefore, one can hardly label appellate counsel ineffective for failing to raise evidentiary challenges in an appellate brief when they were not

properly preserved for appellate review.

As for the phone records, the portion of the transcript supplied by Appellant states that the records were accompanied by an Evid. R. 902(8) notary acknowledgment. Thus, even if raised by appellate counsel, this argument would have fallen on deaf ears. At T.p. 2431, Det. Tackett testified he removed State's Ex. 227, a pair of tennis shoes, from the residence where Appellant was arrested because someone in the house identified them as his shoes. No objection was made, and the statement was not made for the truth of the matter asserted. Again, even if raised, appellate counsel would have had to demonstrate plain error on this point which given the overwhelming amount of evidence in this case, over and above the shoes, the outcome of the appeal would not change.

With respect to "hearsay" at T.p. 2528, no objection was made to the testimony of Dr. Humphrey Germaniuk concerning Donna Roberts' statement about her garage door going up when she thought it should go down. Again, without the objection, this Court would have to find plain error on appeal. The State submits this case did not rise or fall on the rising or falling of the Fingerhut garage door.

Finally, Appellant challenges the testimony of BCI *serologist*, not agent, Brenda Gerardi, and claims error that the trial court permitted her to testify about the statistics she used to link DNA samples found inside and outside Mr. Fingerhut's car to Mr. Fingerhut and Appellant. At trial, defense counsel argued that as a serologist, she could not testify concerning the statics she used in making her comparisons because she did not compile the statistics. First, evidence Rule 703 permits the admission of "facts or data***which an expert bases an opinion on***." As Appellant's appendix details, Ms. Gerardi relied upon statistics collected by the FBI. Moreover,

at least two Ohio courts have held that the statistics relied upon by a DNA expert are not hearsay. *State v. Wages* (1993), 87 Ohio App. 3d 780, 786; *State v. Austin* (1998), 131 Ohio App. 3d 329, 337-338. Provided this Court considered *Austin* and *Wages*, and viewed Evid. R. 703 as controlling, the outcome of this appeal would not be changed.

Proposition of Law No. VI

Appellant argues that the trial court erred because it refused to admit testimony concerning Mr. Fingerhut's character during the penalty phase of his trial. First, Evid. R. 404(A)(2) permits only pertinent character traits of the victim to be introduced that would rebut testimony of the victim's character of peacefulness in a homicide trial. Second, an alleged victim's claimed violent nature is not an essential element of self-defense. *State v. Baker* (1993) 88 Ohio App. 3d 204, 209-210. The evidence proposed by the defense was that Mr. Fingerhut carried a bogus special investigator's badge, and had some credit card problems. Neither of these proposals are relevant to Appellant's claim of self defense. Neither indicate he was violent. The trial court properly excluded this evidence. Therefore, even if raised on appeal, this Court would find that the evidence was properly ruled inadmissible, and the outcome of the appeal would not change.

Proposition of Law No. VII

This Court's own opinion is replete with examples of Donna Roberts' participation in this killing. Neither the State, nor the defense, downplayed her involvement in the presentation of evidence. However, the fact that Donna Roberts was smarter than Appellant and had a predilection for African American males does not excuse the fact that Appellant is a self-confessed killer. The absence of a crime scene reconstruction expert changes none of that. Trial

counsel's performance does not fall below prevailing standards of practice in an inability to discount a confession corroborated by a mountain of evidence showing that Appellant was the actual shooter in this case.

Proposition of Law No. VIII

The prevailing rule in Ohio is that a general unanimity instruction, such as the one given in this case (T.p. 3583), will ensure that the jury is unanimous on the factual basis for a conviction even where the indictment alleges numerous factual bases for liability. *State v. Johnson* (1989), 46 Ohio St.3d 96, 105. Moreover, it is presumed that “ ‘when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged.’ ” *Id.*, quoting *Turner v. United States* (1970), 396 U.S. 398, 420. Most significantly, trial counsel did not object to the solitary, rather than multiple, instructions on unanimity, therefore, any error on appellate is waived except for plain error. *State v. Underwood* (1982), 3 Ohio St. 12, 13. Given the panel obviously reached its unanimous verdicts to the charges in the indictment, Appellant suffered no prejudice and there is no appellate argument to make.

Proposition of Law No. IX

As with the previous Proposition of Law, the trial counsel did not object to the “acquittal first” instruction. Therefore, the issue is waived except for plain error. Moreover, the alleged error is neither obvious nor outcome determinative. In *State v. Thomas* (1988), 40 Ohio St. 213, as cited by Appellant, this Court refused to label the instruction, almost identical to the one at issue here, as an “acquittal first” instruction, and declined to find plain error. “In our opinion, this instruction has negligible coercive potential because it speaks to the jury's inability to find,

whether unanimously or not, a certain element of the greater offense. We are not persuaded that the trial court's instruction unduly prejudiced the appellee, and thus we affirm his conviction of aggravated murder.” Id. at 220. Appellate counsel is therefore not ineffective in foregoing this argument.

Proposition of Law No. X

Appellant’s allegations of ineffective assistance of counsel in mitigation are belied by the record and by this Court’s very own opinion. As for the substitute counsel, it was Appellant himself who insisted that the mitigation proceed with substitute counsel. (Mitigation T.p. 4,5) To permit him to argue this issue on a reopened appeal would open the door to the invited error doctrine. Moreover, a lack of certification under Sup. R. 20 does not create a presumption of ineffective assistance of counsel. *State v. Misch* (1995), 101 Ohio App. 3d 640, 651. Because Appellant cites to no deficiencies in Atty. Wright’s performance, much less any prejudice, he does not state a colorable claim of ineffectiveness.

With respect to Dr. McPherson’s testimony, this own Court’s opinion is replete with the mitigating evidence she offered on Appellant’s behalf, but which paled in comparison to the overwhelming evidence and aggravating circumstances presented by the State of Ohio. *Jackson*, supra, at ¶177-185. The reopening of this appeal would not alter these findings.

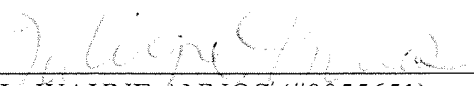
Proposition of Law No. XI

This Court has yet to hold that it is improper for the State to draft a sentencing opinion in capital case. Moreover, the record is devoid of any evidence as to who did or did not draft the sentencing opinion in *Appellant’s* case. Therefore, the reopening of his direct appeal will not resolve this issue.

CONCLUSION

None of Appellant's proposed eleven propositions of law articulates a colorable claim of ineffective assistance of trial or appellate counsel. Thus, there is no reasonable probability of success, and this Court must *DENY* Appellant's application to reopen his direct appeal.


Respectfully submitted,
DENNIS WATKINS (#0009949)
Prosecuting Attorney


LuWAYNE ANNOS (#0055651)
Assistant Prosecuting Attorney
Trumbull County Prosecutor's Office
160 High Street, N.W.
4th Floor, Administration Building
Warren, Ohio 44481
Telephone No.: (330) 675-2426

COUNSEL FOR PLAINTIFF-APPELLEE
THE STATE OF OHIO

PROOF OF SERVICE

I do hereby certify that a copy of the foregoing document was sent by ordinary U.S. Mail on this 1st Day of May to Atty. David Bodiker and Atty. Randall Porter(#0005835), Counsel for Appellant Nathaniel Jackson, Assistant State Public Defender, Office of the Ohio Public Defender, 8 East Long St. 11th Floor, Columbus, Ohio 43215.


LuWAYNE ANNOS (#0055651)
Assistant Prosecuting Attorney

APPENDIX

1 don't want to do it?

2 A. Right, and I don't want anything to do with
3 it.

4 MR. CONSOLDANE: I'm finished.

5 MR. WATKINS: I move that he be
6 relieved of this responsibility because there's
7 cause because of his personal beliefs.

8 THE COURT: Any objections?

9 MR. CONSOLDANE: No, Your Honor.

10 THE COURT: Mr. Fenton, we thank you
11 for your time.

12 MR. CONSOLDANE: Your Honor, we want
13 to register an objection no matter what. We think
14 he should not be excused.

15 THE COURT: Objection is noted and
16 overruled. Thank you for your appearance, Sir.

17 (Juror number 3 excused from the Courtroom.)

18 (Juror number 7, Arthur Phillips entered the
19 Courtroom.)

20 THE COURT: Good afternoon,
21 Mr. Phillips. The reason we have asked you in
22 today, this is what we call this individual Voir

1 MR. WATKINS: 311. 311.

2 MR. MORROW: 311.

3 A Okay. This is State's Exhibit 311, which was
4 covered, recovered from the Days Inn clerk, Rita Morrison,
5 while I was there on the 16th.

6 Q What does it contain?

7 A It contains a registration form which was marked
8 Exhibit 311-A which was filled out by the desk clerk on the
9 evening that they registered, or that Donna M. Roberts
10 registered. It lists her address at 254 Fonderlac, Warren,
11 Ohio. The signature here is of Donna Roberts. Paid with a
12 credit card for one week's rental at a rate of \$235.20. It
13 shows that they checked in, she checked in December 11th and
14 the check-out date is December 17th.

15 Q Now, do you know the time on December 11th?

16 A Well, the check-in time was approximately 10:30 in
17 the evening. We did a calibration of the machine they have
18 there and found that their machine is off almost an hour from
19 the time they checked in. So the receipt actually shows that
20 they, that Donna Roberts checked in at 11:33. And in
21 actuality, the clock is approximately an hour fast. So it's
22 really --

23 Q And who did that check?

1 A Detective Dillon did that on December 18th.

2 Q And --

3 MR. LEWIS: Wait a minute. Just a minute,
4 Dennis. Wait a minute.

5 THE COURT: Just a minute. Objection?

6 MR. LEWIS: The objection is I don't, I'm
7 trying to gather this. Paul, do you know that for certain or
8 what? I mean somebody told you that or what? About the
9 clock. Everybody's clock is wrong here.

10 THE WITNESS: I know that for certain and
11 I have a copy of a receipt dated 12-18 of 2001 when they,
12 when Detective Dillon went there and physically checked.
13 They ran a credit card through the machine to see what time
14 it would print out versus the actual time.

15 MR. LEWIS: Okay. But you didn't do it
16 personally?

17 THE WITNESS: No, sir.

18 MR. LEWIS: You didn't see it? You're
19 just testifying as to what Officer Dillon told you; right?
20 Is that basically it?

21 THE WITNESS: What Officer Dillon told me
22 and this receipt here has the date and the time they
23 conducted the audit when they scanned it and the time that

1 they actually did --

2 THE COURT: Just a minute. This, I think,
3 has to be distinguished on this basis. The officer doesn't
4 know that of his own personal knowledge. It may or may not
5 be true. The prosecution has the right to establish that,
6 the veracity of that through bringing whoever in that did the
7 test. But for purposes of this cross examination, this
8 officer, in the scope of his employment, takes that as being
9 true. Whether it is or not, his testimony at this point is
10 that he's assuming that's true. Let's go on from there.

11 MR. WATKINS: Fine.

12 Q (By Mr. Watkins) Therefore, Detective Dillon was
13 the person who reported that to you; is that correct?

14 A Yes, it was.

15 Q And now, what did, what did you personally see at
16 that point when you went there?

17 A On the 16th?

18 Q Yes.

19 A I saw item 211A.

20 Q That's 311A?

21 A 311A, which is the registration form filled out with
22 Donna Roberts.

23 I was personally there when 311B was collected,

1 Q Now I'm gonna show you State's Exhibit 311 and
2 there's documents inside. Would you tell the jury whether or
3 not you recognize that exhibit?

4 A Yes, sir. The top one.

5 Q And what is it?

6 A That is the transaction that we conducted, the
7 audit, to determine what time the machines showed it was when
8 the transaction was made.

9 Q And who conducted the audit?

10 A The employee, Jeff Pescarella, the desk clerk, and
11 with myself standing there.

12 Q And you were participating?

13 A Yes, sir.

14 Q And explain exactly what was done.

15 A However he uses the machine, he ran a transaction
16 through and had it print a receipt to show what the date and
17 time were at the actual date and time that we were conducting
18 this audit.

19 Q And what did you find?

20 A We found that the machine itself was off by
21 approximately 46 minutes I believe. It was 46 minutes faster
22 than the actual time.

23 Q And what document did you receive in there, and you

1 may take them out, that you personally received?

2 A This document. It's a double receipt.

3 Q Okay.

4 A Carbonated receipt. Carbon receipt. And it shows,
5 it shows it to be December 18th, 2001, and the time to be
6 12:40 p.m. and it was actually 46 minutes earlier than 12:40.
7 I can't do the math in my head.

8 Q Okay. And so that, what is the number of that
9 particular exhibit other than being 311? It's 311 what?

10 A C.

11 Q And that was done in your presence to establish --

12 A Yes.

13 Q -- that the clock was, that the time was off?

14 A Yes, sir.

15 Q Did you also go to the Greyhound bus terminal?

16 A Yes, sir.

17 Q And when did you go there?

18 A I believe that was on the 14th.

19 Q Okay.

20 A Of December 2001.

21 Q And what did you do there?

22 A I spoke with several employees there about
23 Mr. Fingerhut and the day, the last day that he had worked

One, indictment for aggravated murder, and it reads quite simply, "We, the jury in this case, being duly impaneled and sworn or affirmed, find the defendant Nathaniel E. Jackson, ..." and there's a blank space. There's an asterisk beside the name and down below there is an instruction, insert whatever your decision is, guilty or not guilty, "... of aggravated murder, did purposely cause the death of Robert Fingerhut with prior calculation and design," on the date in question and the manner and form as which he stands charged in the indictment.

Now, you will notice that there is a signature line for a date. The fore person that you pick should make sure that each verdict form signed has the date on it. There are then 12 signature lines. This being a criminal trial you have to have the unanimous verdict on anything you decide to have a proper finding. Let me put that another way. You have to have the unanimous finding by 12 people in agreement to have a guilty finding, okay?

The second verdict is on the specification attached to Count One. The third form is Specification Two to the first count of the indictment. And depending on where you are at according to the instructions that I've given, you will also have, if you reach that point, Count One, lesser

MITIGATION TRANSCRIPT

1 Thursday, November 14, 2002, Mitigation Hearing,
2 In Open Court at 1:00 p.m.:

3 THE COURT: We have several matters
4 for the record before we call the Jury up. It is
5 come to my attention that Mr. Lewis, co-counsel on
6 the defense team, has had a little stay in the
7 hospital, nothing serious. He's back home now, but
8 because he's medicated, does not feel it would be
9 appropriate to appear on the defense team today.
10 Mr. Consoldane, I have asked you, with the
11 Prosecutor, whether or not you had any motion or
12 wish to have this matter continued until Mr. Lewis
13 is available, and what is your reply to that?

14 MR. CONSOLDANE: I have talked with
15 Mr. Jackson and we do not think that any delay at
16 this point would be wise. I have also talked with
17 Tom Wright, who has a contract to work with our
18 office. Mr. Wright has gone through the three day
19 death penalty seminar. He also meets the other
20 requirements. He, however, is not certified. He
21 has not applied for the certification and would ask
22 the Court to permit him to sit as co-counsel in

1 this case with me, so we can get this finished.

2 THE COURT: May I speak to your
3 client?

4 MR. CONSOLDANE: Yes.

5 THE COURT: Mr. Jackson, are you in
6 agreement with proceeding without Mr. Lewis being
7 here and having Mr. Wright and Mr. Consoldane?

8 THE DEFENDANT: Yes, Sir, Your
9 Honor.

10 THE COURT: I understand that I
11 would consider a continuance until probably Monday,
12 if you wished.

13 THE DEFENDANT: Yes, Sir.

14 THE COURT: You have talked with
15 your attorney and have agreed with him that it is
16 in your best interest to go forward today?

17 THE DEFENDANT: Yes, Sir, Your
18 Honor.

19 THE COURT: Fine. In regard to Mr.
20 Wright, the Court is aware that he practices in our
21 county and practices before this Court on a regular
22 basis. And I have no problem with allowing him for

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

ORIGINAL

William K. Suter
Clerk of the Court
(202) 479-3011

June 5, 2006

Clerk
Supreme Court of Ohio
65 South Front Street
Columbus, OH 43215-3431

ON COMPUTER - TAI

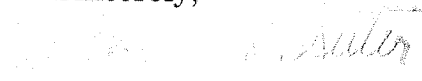
Re: Nathaniel E. Jackson
v. Ohio
No. 05-10187
(Your No. 2003-0137)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk

